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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 880.

THE TOLEDO NEWSPAPER COMPANY AND NEGLEY D. COCHRAN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TRANSCRIPT OF RECORD

The United States of America, Northern District of Ohio, Western Division, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at the city of Toledo, in said District, on the last Tuesday in October, being the 27th day of said month, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-ninth, to-wit: On Saturday, the 23rd day of January, A. D. 1915.

Present: Honorable John M. Killits, U. S. District Judge.

Criminal No. 1535.

The United States of America,

vs.

The Toledo Newspaper Company and Negley D. Cochran.

Said Action was commenced on the 29th day of September, A. D. 1914, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

ORDER FOR AN INFORMATION IN CONTEMPT.
(Entered by Judge Killits Sept. 29, 1914.)

Whereas, there have come to the attention of the judge of this court as a daily reader of a newspaper published and generally circulated in the City of Toledo, State of Ohio, known as the Toledo News-Bee, and purporting to be published by The Toledo Newspaper Company, a corporation, and edited by one Negley D. Cochran, from time to time sundry numbers thereof for dates between the 24th of March, 1914, and September 17th, 1914, inclusive, containing news articles, cartoons and editorial utterances concerning the case of Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners as Henry L. Doherty & Company, plaintiffs, against The Toledo Railways & Light Company and the City of Toledo, defendants, pending in this court during all of said time, and still pending, and concerning the parties to said cause with reference to said cause, and this court with reference to said cause, and the judge of this court with reference to said cause, which matters, being news and editorial comment and cartoons as aforesaid seem to involve the said The Toledo Newspaper Company and said Negley D. Cochran as editor of the said newspaper in contempt of the authority of this court, as misbehavior on the part of said corporation and said editor, and both, so near to the presence of this court as to obstruct the administration of justice, reference being particularly made to the issues of said newspaper of March 24, 1914, March 25, 1914, March 26, 1914, March 27, 1914, March 28, 1914, March 30, 1914, March 31, 1914, August 14, 1914, September 5 1914, September 9, 1914, September 10, 1914, September 11, 1914, September 12, 1914, September 14, 1914, September 16, 1914 and September 17, 1914.

The United States District Attorney for the Northern District of Ohio is therefore directed to prepare and file in this court an information in contempt against The Toledo Newspaper Company and said Negley D. Cochran, based upon said publications separately and in their aggregate effect, charging said corporation and said Cochran each with contempt of the authority of this court with reference to said cause and with reference to proceedings in this court growing out of the pendency of said cause, with such appropriate averments of inducement, colloquium and innuendo as in his judgment may be neces-

sary to show the force, effect, tendency, intent and purpose of the several publications, and all of them This he will do at his earliest convenience consistent with his other official duties.

INFORMATION.

(Filed October 20, 1914.)

In the District Court of the United States, within and for the District aforesaid.

At the October Term of said court, in the year of our Lord One Thousand Nine Hundred and Fourteen, U. G. Denman, Attorney of the United States for the Northern District of Ohio, who in this behalf prosecutes in the name of the United States, and for the United States in pursuance of an order of this court heretofore made and entered, comes here into said court on this 28th day of October, A. D. 1914, in his own proper person, and for the United States gives the said court here to understand and be informed that said The Toledo Newspaper Company, a corporation, incorporated, organized and existing under the laws of the State of Ohio, and said Negley D. Cochran for more than five years prior to and up to and including September 17, 1914, published, sold and generally circulated within the City of Toledo and vicinity thereof, in the State of Ohio, in said Western Division of said Northern District of said State, and within the jurisdiction of this court, a daily newspaper known as "The Toledo News Bee," hereinafter called the Newspaper, and said Negley D. Cochran throughout said time was and still is the editor thereof; that during and throughout the current year 1914, there were circulated and sold as aforesaid, within the territory aforesaid, each day approximately fifty thousand copies or more of said Newspaper, that said City of Toledo during said year 1914, and for three years prior thereto, was and still is the residence of the Honorable John M. Killits, Judge of said United States District Court for the Northern District of Ohio.

That for many years prior to the 28th day of March, 1914, a city street car system in said City of Toledo, namely the only city street car system in said city, was operated and controlled by a corporation known as The Toledo Railways and Light Company, hereinafter called the Street Car Company, and its predecessors in title under franchises granted by the council of said city; that in the spring of the year 1913, the exact date being to your informant unknown, a partnership known as Henry L. Doherty and Company, composed of one Henry L. Doherty, Charles T. Brown and Frank W. Fruecauff, as partners aforesaid, and hereinafter called the Partnership, entered into a contract for the management of said street car system in said city, for said Street Car Company, and from said time in 1913, continuously up to the present time have managed and operated for said Street Car Company, said street car system; that with the close of March 27, 1914, practically all the franchises owned by said Street Car Company as aforesaid, on the streets of said City of Toledo expired, the names of all of said streets being to your informant unknown, since which time continuously said Street Car Company and said partnership have operated said street car system without franchises on said streets; that in November, 1913, the council of said city passed an ordinance known as the Schreiber Ordinance, to go into effect March 28, 1914, on said expiration of said franchises of said Street Car Company, by the terms of which ordinance said Street Car Company and said partnership operating said street car system, were required to convey passengers at all hours upon the streets of said city, over said system for a rate of fare not to exceed three cents, including one transfer from one car line to another; and which ordinance further provided, first, that any attempt of said Street Car Company to run its cars on the streets of said city on and after March 28, 1914, should be construed as an acceptance of the terms of said ordinance, and second, that the City Solicitor of said city should make application to the proper court for an order compelling said Street Car Company to obey the terms of said order respecting said rate of fare; that said Street Car Company and said partnership managing the same as aforesaid, promptly notified said city that they could not accept the terms of said Schreiber Ordinance, and would not operate their cars on the streets of said city thereunder.

That on the 16th day of January, 1914, said partnership began a suit in said United States District Court for the Northern District of Ohio, Western Division, in equity, against said Street Car Company, and entitled: "Henry L. Doherty, Charles T. Brown and Frank W. Fruecauff, Partners

as Henry L. Doherty and Company, plaintiffs, against The Toledo Railways and Light Company, a corporation, defendant," which suit immediately became, and from then continuously until after the 17th day of September, 1914, remained a pending action in this court; that contemporaneously with the beginning of said suit, said plaintiffs therein requested leave of this court to make said City of Toledo a party thereto on or before the 27th day of March, 1914, and on the 24th of March, 1914, said plaintiffs filed in this court a supplemental petition, and a motion in said suit asking that said city be made a party thereto, which was immediately granted by this court, and they filed therein a motion asking that a temporary order of injunction be issued by this court restraining the enforcement on and after March 28, 1914, of said Schreiber Ordinance for the reason, as stated in said motion and in affidavits filed in support thereof, that said ordinance was confiscatory, unreasonable and invalid; that thereupon, on and after date of March 24, 1914, said The Toledo Newspaper Company and Negley D. Cochran, said editor thereof as aforesaid, hereinafter called the defendants, in contempt of the authority of this court, and with reference to the proceedings in said suit so pending in said court and before said the Honorable John M. Killits, Judge of said court, published and caused to be published and circulated in said Newspaper as aforesaid, at the times hereinafter set forth, the newspaper head lines, cartoons and alleged news articles hereinafter in this count set forth and referred to, that is to say: 1. That on said date of March 24, 1914, said defendants caused to be published in said newspaper aforesaid, and circulated as aforesaid, a head line extending across eight columns of the first page of said Newspaper in the following language: "BIG CON FIGHTS THREE CENT FARES IN FEDERAL COURT; MAY ASK INJUNCTION AGAINST THE SCHREIBER ORDINANCE," meaning by the use of said words "Big Con," said Street Car Company and said partnership; and said defendants also caused to be published and circulated as aforesaid, in said Newspaper at the same time under said head line, a cartoon entitled: "AT THE LAST DITCH," and a news article, said news article being continued on page five of said Newspaper and containing among other language the following: (a) "THURSTIN (meaning the City Solicitor of said City), DECLARES HE INTENDS TO FIGHT UNTIL THERE IS NOTHING LEFT—WILL DEFEND ANYONE WHO WILL NOT PAY" (b) "THURSTIN PROMISES TO PROTECT RIDERS" (c) "SOLICITOR THURSTON PROMISES TO PROTECT THOSE WHO ARE EJECTED FROM

CARS FOR REFUSING TO PAY MORE THAN THREE CENTS" (d) "SOLICITOR THURSTIN DECLARES HE WILL PROTECT ANY PERSON PUT OFF A CAR BECAUSE OF HIS REFUSAL TO PAY MORE THAN THREE CENTS FARE"

Said language just quoted above tended and by said defendants was intended in connection with said head lines to convey to the public and give the public to understand that the City Solicitor of said city would protect any person who might refuse to pay more than a three cent fare on said street car system notwithstanding any order, finding or holding which said court might enter or make in said suit. A Newspaper copy of said head lines, cartoon and news article made a part of this count is as follows:

THE TOLEDO NEWS-BEE

Tuesday Evening, March 24, 1914.

BIG CON FIGHTS THREE-CENT FARES IN FEDERAL COURT; MAY ASK INJUNCTION AGAINST THE SCHREIBER ORDINANCE.

COMPANY DECLARES FARE GRANT IS CONFISCATORY AND ILLEGAL; DRAGS CITY INTO A LAWSUIT.

THURSTIN DECLARES HE INTENDS TO FIGHT UNTIL THERE'S NOTHING LEFT—WILL DEFEND ANYONE WHO WILL NOT PAY.

AT THE LAST DITCH

HERE'S STREET CAR TANGLE IN TABLOID; THURSTIN PROMISES TO PROTECT RIDERS

Doherty & Co. ask federal court for an injunction restraining the city from enforcing the three-cent fare or $250 a day rental ordinance.

Federal Judge Killits makes the city a party to the receivership suit filed against the Big Con by Doherty & Co. last January.

The Big Con declares, in an answer in federal court, that franchises on all lines except the Huron and South, Bancroft and Indiana-Stickney do not expire until Oct. 6, 1915.

Ordinance granted to William Collins in 1890, the company claims, extends franchises on all lines except the Robison lines.

Big Con claims, in court suits, that three-cent fare is confiscatory and illegal because it does not become effective for 90 days after it passed.

Hearing on motion for injunction will be held probably on Thursday in Cleveland. Judge Killits is holding court there.

Solicitor Thurstin promises to protect those who are ejected from cars for refusing to pay more than three cents.

Thurstin says he will fight the application for an injunction and every other legal move of the company.

Three-cent ordinance goes into effect on Saturday at 12:01 a. m.

Council, by vote of 14 to 4, "stands pat" on Schreiber ordinance and refuses to postpone its operation.

Council franchise committee given 60 more days in which to conduct negotiations with the Big Con and other companies for the Toledo franchises.

Audience of 400 interested men, women and children pack council chamber and hiss those councilmen who urge postponement of three-cent ordinance.

Councilmen Kilbury, Kewley, Schwartz and Irwin voted against adopting the report of special franchise committee.

With Henry L. Doherty directing operations, the Big Con got busy early on Tuesday in its efforts to evade the provisions of the Schreiber three-cent fare ordinance, which will go into effect on next Saturday at midnight as a result of the action of city council on Monday night.

The first development came when Attorney Thomas H. Tracy, acting for Henry L. Doherty & Co., filed in federal

court a motion asking that the city of Toledo be made a party to the suit of H. L. Doherty & Co. against the Toledo Railways & Light Company, filed in January.

In the original suit the Doherty Company had asked permission to make the city a party defendant at any time on or before March 27. Clerk James W. Wilson called Judge Killits, who is holding court in Cleveland, on the phone. The clerk read the motion to the judge, who granted it.

SAYS ORDINANCE IS CONFISCATORY.

Immediately after this motion was filed, Attorney Rathbun Fuller, acting for the Big Con, filed in United States District Court the company's answer to the suit of the Doherty Company against the Big Con. In this answer, the company sets up that the three-cent ordinance pased by the city is confiscatory; that the ordinances on all of the lines in the city, excepting the Bancroft Belt, Indiana-Stickney and Huron-South lines, do not expire until Oct. 6, 1915; and that the Schreiber ordinance, passed last November, is illegal because it does not take effect until three months after passage.

A few minutes later Attorney Thomas H. Tracy filed in the United States Court an amendment and supplement to the bill in the case of Doherty against the Big Con, in which a temporary injunction against the city, its officers, agents, employes and "all other parties and persons whomsoever to whom notice thereof is given" from asserting, enforcing or attempting to assert or enforce any of the terms or provisions of the $250-a-day ordinance, the Schreiber three-cent fare ordinance. Hearing on the application for an injunction probably will be held on Thursday, in Cleveland, where Judge Killits is holding court.

Deputy Clerk Wilson of the United States District Court said on Tuesday that he did not believe Judge Killits would return to Toledo this week. In view of the fact that the ordinance is effective on Saturday at 12:01 a. m., it was the opinion of attorneys of the Big Con and Doherty & Co. that the hearing should be held by Thursday at the latest.

WHAT COMPANY RELIES UPON IN SUIT.

In its answer the Big Con sets up that its grants on all lines, except the Bancroft Belt, Huron-South and Indiana-Stickney, were extended to Oct. 6, 1915, when the city council on March 13, 1890, passed an ordinance granting to William A. Collins the franchise for what is now the Ironville line, and also, on Oct. 6, 1890, council passed an ordinance authorizing Collins to construct an extension to the Ironville lines.

The extension of the franchise, the company says, results from an agreement, which the city ratified, between Collins and the old Toledo Consolidated road, which at that time owned all the street car lines in Toledo except the Robison lines.

In asking a temporary injunction restraining the city from enforcing the three-cent ordinance, the amended bill says the city, through newspapers and otherwise, is advising people to refuse to pay more than a three-cent fare and is offering to protect such persons.

The bill says the company is now carrying 125,000 passengers per day and that it is furnishing the only public means of transporting passengers through or over the streets of Toledo. It says the company cannot carry passengers under the terms of the so-called Schreiber ordinance and that it should not be subjected to pay the rental of $250 a day provided in the ordinance of July 26, 1911.

The bill says that if the Big Con refuses to accept three-cent fares after March 27, and passengers refuse to pay more, "confusion, annoyance, trouble and great loss, injury and damage will be suffered," both by the Big Con and the Doherty Company.

THURSTIN IS NOT SURPRISED BY SUIT.

"The legal moves of the company did not come as any surprise to me," said City Solicitor Thurstin on Tuesday. "I will fight not only that injunction suit but I intend to fight the company until there is nothing more to fight about."

The solicitor, in reply to a question as to whether he will secure additional legal help during the controversy with the Big Con said:

"I have not considered that course as yet. I have a perfect right to and have a fund for that purpose but I am not decided on that as yet."

Solicitor Thurstin declares he will protect any person put off a car because of his refusal to pay more than three-cent fare.

Mayor Keller said: "The fact that the Railways & Light Company began pushing its case in Federal Court puts a different phase on the question. There is no telling what may happen between now and next

Continued on Page Five.

BIG CON FIGHTS IN FEDERAL COURT AGAINST THREE CENT FARE ORDINANCE.

Continued from Page One.

Saturday, but if the situation remains as it is I certainly will do all I can to assist the city solicitor in enforcing the terms of the Schreiber ordinance—even," he said, with a smile, "if I have to call out the reserves."

WHAT COUNCIL DID.

The city council, by a vote of 14 to 4, rejected on Monday night the plea of the Big Con that the operation of the three-cent ordinance be deferred for 30, 60 or 90 days after it becomes operative after 12:01 a. m. on next Saturday.

The city council, in adopting the report of the special street railway committee, figured that by "standing pat" it was "passing the buck" to the street railway company.

Mayor Keller, Solicitor Thurstin, Vice Mayor Hassenzahl and the 14 councilmen who voted to uphold the committee in its report, had smiles to spare after it was over.

Besides refusing to defer the enforcement of the three-cent ordinance after next Friday, the council gave the committee 60 more days to receive franchise proposals and make further report to council.

NO MUNY PLAN MADE.

The committee, in secret session on Monday afternoon, discussed for an hour the advisability of reporting to council that legislation be prepared and passed by council providing for the submission of the question of municipal ownership of all electric lines in the city.

It was finally decided not to overload the report of the committee at this time. It was feared that the committee's report might not be sustained, if it contained a municipal ownership clause. Further, it was thought best to first secure information as to what municipal ownership would entail in the way of financial expenditure. So a recommendation on that question was deferred until the final report.

HOW THEY VOTED.

Those were the councilmen who voted against any postponement of the enforcement of the three-cent ordinance.

Brown of the Fourteenth ward, Dolan of the Ninth, Dotzert, councilman at large; Enoch of the Eleventh, Hein of the Thirteenth, Hoffman, at large; Krzyzanek of the Third, Miller

of the Twelfth, Mulholland, at large; Redd of the Fifteenth, Ruppel of the Second, Shanks of the Fifth, Sievert of the First and Spaulding of the Eighth.

Opposed to the adoption of the report were Joseph Schwartz of the Tenth ward, who introduced legislation to give the company 30 days' leeway; William Kewley of the Sixth, who had said that though he voted for the three-cent ordinance he was never for it; C. C. Kilbury of the Fourth and Harry T. Irwin, whose constituency is in the "silk stocking" Seventh ward.

LIKE HISTORIC NIGHT.

Council chamber looked much as it did on one memorable night ten years ago. Only the St. Clair St. petition in boots was lacking.

Johnson Thurston, who stood on a soap box in the street, 10 years ago, and cried out to the blanched faces in the council chamber, "Let the franchise alone," sat in the front row of the seats reserved for the spectators. At his back there was a determined lobby.

The place was crowded to overflowing. No more could get in. Many had to stay out. There were men and women —and even children from the Newbury school—packed in. Many stayed from the first tap of the gavel until the lights were out.

VETERANS ARE THERE.

Men who had been in the franchise fight for a dozen years were there to see how these new councilmen would act in a crisis. Former Councilman C. W. Ward, who had been through franchise fights, was there. So was Nye S. Bingham.

Men from almost every walk of life were out. They had taken an evening off. They had come down to their council chamber to see how their representatives were acting for them.

Four representatives of the Big Con had come early and taken five front seats. These later were relinquished as Henry L. Doherty, head of the operating company, Attorneys T. H. Tracy and Rathbun Fuller, and President Frank R. Coates arrived.

Among several delegations were committees from the Lucas County Republican league, headed by S. B. Chambers and A. C. Jones, and from the Central Labor Union, headed by Henry Wollerman and others.

FORMER OFFICIALS THERE.

Others who watched the proceedings were ex-Councilmen McDonough and Gardner, who voted for the Schreiber 3-cent fare ordinance in the last council; former Service Director J. R. Cowell, John B. Friend, Cornell Schreiber's manager in the last campaign; Henry Streetman of the Alexander Black Cloak & Suit Company; Royal R. Scott of the Willys-Overland Company; John M. Ormond, A. B. Luten, E. H. Close, a director of the Big Con, and his assistant in the real estate business, George Ricaby, and Attorney Frank L. Mulholland.

HOOTS AND CHEERS.

Any reference to three-cent fare, improved car service, proper provision for the needs of the worker, was greeted by enthusiastic applause. Statements construed to lean towards the company were hooted.

Henry L. Doherty himself, with a lobby apparently strongly against him, was loudly applauded. Both he and his counsel, T. H. Tracy, begged of the council committee to postpone enforcement of the ordinance, only for a little while, but to no avail.

Councilmen depended upon to bring aid to the Big Con were slow in getting into action. When they were in action, they were awkward in their attempt to deliver the goods entrusted to them.

SCHWARTZ ASKS TIME.

Councilman Joseph Schwartz offered a resolution extending the date of the enforcement of the three-cent ordinance for 30 days.

The ordinance was immediately referred to the street railway franchise committee. Schwartz's motion to take it from the committee and place it on its passage received no second.

No sooner had President Hassenzahl rapped, calling the council to order, than on first call Councilman James W. Brown, first man on the roll call and himself a member of the special franchise committee, introduced this report of the committee:

"Your committee here fore appointed to investigate and report on the matter of a franchise for the operation of the electric street railway in the city of Toledo, reports and recommends as follows:

TELL OF ADVERTISEMENTS.

"Advertisements are being placed with various papers requesting proposals from traction interests respecting the operating of railroads in Toledo, and there is in the hands of the officers of the Toledo Railways & Light Company certain rough plans for operating the street railway and your committee expects, within a brief time, proposals will be received from the Toledo Railways & Light Company relative to such plans.

"Your comittee has held various meeting at which times discussions were had relative to the best methods of operating the street railway, municipal ownership and kindred subjects, and your committee sugests that it be given an extension of 60 days in which to receive proposals and to further report to your honorable body not later than the 23d day of May, 1914.

"Your committee recommends that in the meantime the existing ordinance passed November 24, 1913, relative to the operation of the street railway system in Toledo on and after March 27, 1914, remain unaltered and in force until a further report can be transmitted by your committee to your honorable body for final action."

The report was signed by Mayor Keller, City Solicitor Thurstin, Vice-Mayor Hassenzahl and Councilmen Dotson, Heinz, Ruppel and Brown.

"If there are no remarks, the clerk will call the roll on the adoption of the report," said the chairman, after Councilman John Mulholland moved that the report be adopted.

Here Thomas H. Tracy, counsel for the Big Con, arose and asked if he could be heard at this time. With the permission of the president, Tracy came within the council's railing.

"This report of the committee," said Tracy, "is of great importance to the entire city of Toledo and also, of course, it is of great importance to the Toledo Railways & Light Company. And I wish to say, before a vote is taken, a few words so that each one of the councilmen may be advised of the situation as far as the Toledo Railways & Light Company is concerned.

"As all of you know, the negotiations have been under way for a long time. The present administration, however, came into power only on January 1. And the new administration of the affairs of the street car company has not been in power a great while longer. This franchise matter, necessarily, has been under the consideration of this administration for only a short time.

TELLS OF SPURNING.

"On February 4 Mr. Doherty came on from New York, appeared before council and asked that a committee be appointed to take up franchise negotiations with the company with a view to bringing about a speedy settlement of the matter. At that time, for some reason or other, council voted down the proposition to appoint a committee to negotiate.

"The committee later was appointed by council. On February 19, Mr. Doherty again came on from New York, and requested that he be notified when the committee was ready to hear him.

"But nothing came of that request. So a few days ago, acting for Mr. Doherty, I made another request that he be heard. He came to Toledo from New York on last Thursday and had his first hearing. We met the committee on Saturday, and on Monday, and negotiations have been started that I earnestly urge upon council should be continued. They are actually under way. The Toledo Railways & Light Company has endeavored in every way to facilitate the negotiations.

OFFICIALS ARE NEW.

"I want to call the attention of councilmen to the fact that in January, 1912, the city of Toledo entered into an agreement with the street car company, as a result of which the rates of fare now in vogue were continued and are still in effect. These rates were to be in effect pending negotiations for a settlement of the franchise question.

"Although this is a new set of officials, it is the same city that we have to deal with and in which we are all interested. And although the Toledo Railways & Light Company is the same company, it has a new set of officers.

"I don't believe it is fair or just or reasonable, although we have new officials, that this city should go back on its agreement. And I don't believe any of you will say that we have not lived up to our end of the agreement.

"All we ask is that the Schreiber ordinance be extended for a period of 30, 60 or 90 days, at the discretion of council, with the present rates of fare, so that the negotiations for a franchise settlement may be continued. Our relations so far have been pleasant and harmonious, and I believe that we could bring about a settlement of this matter in 30 days, if necessary.

SAYS IT'S REASONABLE.

"In conclusion, I want to say that, as between man and man, I believe in fairness you should take advantage of our offer to let the city appoint an expert commissioner to run the street railroad property for a period of 30, 60 or 90 days.

"Let him get first hand knowledge of the problems this company is facing. Extend this ordinance for a short time and continue the negotiations to a speedy settlement. Speaking honestly, I say this is only fair and just and reasonable."

No sooner had Tracy completed his futile plea for postponement than Councilman Joseph Schwartz of the Tenth ward said that he was of the opinion that "the franchise question is a very large proposition and that it ought not to be handled hastily."

Schwartz then presented his resolution, which, if approved, would have postponed the enforcement of the Schreiber ordinance for 30 days.

KILBURY IS OPPOSED.

After some sparring it was decided that if there were objection, the resolution was out of order, and that nothing could interfere with the roll call that had been ordered.

Councilman Kilbury, too, objected to the adoption of the committee's report.

"You must not overlook that this report, besides giving to the committee an extension of 60 days in making its report, also contains a clause that will enforce the three-cent fare ordinance after next Friday," Kilbury said.

"It seems to me that two years ago the passage of the three-cent ordinance was for the purpose of bringing the Railways & Light Company to time. The result was that we got three-cent fares morning and evening. I voted for the three-cent fare ordinance last fall for the same reason.

CHANGES HIS VIEW.

"If I had had the least idea when I voted for three-cent fares that it was going to be forced on the company, I would not have done so. We have the upper hand of the company at this time, so far as telling it what it can and what it cannot do, and it is up to them to do whatever they please under the circumstances.

"I do not feel that as yet the Railways & Light Company has had a proper opportunity to talk business or to present its side of the case properly.

"After you get a man cornered, after he has tried time and again to negotiate properly, he will fight. I don't know that this is the attitude of the Railways & Light Company, of course, but it is of people generally.

HINTS AT BLOODSHED.

"Suppose that on and after next Friday the company should continue to operate cars and that the conductors would refuse to accept three-cent fares between the morning and evening hours, there would be bloodshed very likely, and everything else that goes with it."

At this point in his remarks, Councilman Kilbury was fiercely hooted by men in the lobby. Hisses and cat calls were heard. Sergeant-at-arms Frisch started toward the crowd. President Hassenzahl cried out: "None of that. None of that." Councilman Kilbury held his ground after order had been restored. He continued:

"Conditions might be created here which we do not want. If there was any object in dragging the question along, I would not favor giving the company any more time. That is, if they had had proper time to present their case. If the company is willing to submit a proposition, why not give it an additional 30 days in which to make it."

ASKED A DIVISION.

Councilman Sievert of the First ward said he saw in the report of the committee a double resolution. He favored dividing it, so that council would vote on the matter of giving the committee more time as one matter, and on the matter of giving the company more time as entirely different.

Councilman Spaulding of the Eighth ward said that as long as the committee had presented its report in the form it did, it evidently wished it acted upon in its present form.

"I think we ought to pass it."

Spaulding was applauded.

"Now, gentlemen," said Councilman-at-large Mulholland, "this doesn't seem to be a life and death matter. The company has had eight years in which to settle this, and it hasn't done it yet. I don't think anything will be lost by adopting the committee's report."

DOHERTY IS NERVOUS.

The council was now about to go on record. It was apparent that if Henry Doherty himself could not induce the council to disregard the committee report, none could. T. H. Tracy asked that Doherty be heard.

Doherty, for the first time showing any nervousness since the beginning of his acquaintance with members of the council, was gazed at eagerly by the crowd, when he took the floor to address council.

"Frankly, gentlemen," Doherty said, "I am both surprised and disappointed at the report of the committee. I think you will agree with me that we have done everything we can to bring about a permanent and satisfactory settlement with the city."

Doherty told of his several visits to the city with the view to bringing about a settlement, how he had told council on his last visit that he would like to meet the committee and do what he could at any time to assist in bringing about amicable settlement. He admitted that the committee needed more time to formulate its report, but he said that the company also needed an extension of time.

WILLING TO CONTINUE.

"This is our position," Doherty said. "Under a former administration we did agree to make material changes in the rates of fare. On the other hand, the city had agreed to keep these rates in effect until some permanent settlement has been reached, or at least until such time as it had been conclusively demonstrated that no settlement could be reached. We are willing to continue those rates at this time.

"We cannot do the impossible," he said, advancing a step so as to make his point more emphatic. "But we do want to do everything that is possible. I sincerely hope that the council will give us an extension of time upon the enforcement of the Schreiber ordinance.

"We cannot, under our present situation, operate under three-cent fare. But I know, gentlemen, if you become acquainted with the situation as we are acquainted with it, we cannot disagree.

IS NOT FAIR PLAY.

"I don't believe there can be fair play when the people are misinformed as to the facts. We would ask that the enforcement of the ordinance be postponed until such time as the people can be given an opportunity to learn the facts."

When Doherty had concluded, his friends, as well as those opposed to his views, applauded him.

Doherty had said that the men at the head of the company now are not the men who had been at the head of it in other franchise contests. To this President Hassenzahl of council replied:

"This thing has been up for 10 years past, and the fact is that, with one or two exceptions, the same old crowd is behind the company. I believe that if you postpone enforcement of this ordinance, gentlemen of council, you are only giving the company what it wants, an opportunity to play for more time."

APPLAUSE IS GREAT.

Great applause greeted this outburst. There were cries of "That's the system," and "He's the man for us," mixed with the clapping of hands and shouts of glee.

Councilman Irwin wanted to take more time on the subject. He favored giving the company an extension.

"I believe I represent people who want fair play," he said, "but I don't think that we ought to let the impression go out from Toledo that we are going to squeeze a man when he is down."

That met with jeers.

Councilman Finch of the Eleventh ward was shaking with emotion when he arose to explain the reason for his vote for enforcement of the ordinance. The little Division St. barber looked back to the spot where his friends were congregated, and started in on his maiden speech. He said:

WANT BETTER SERVICE.

"I want to tell the traction company that our people want better service. They want three-cent fares, too. The girls that work in the stores, who don't get down until after 7:30, want three-cent fares, as well as the women and the men who don't get home until late.

"Besides that, we are going to get three-cent fares, and after that we are going to insist on better service, if not on any other line at least on the Nebraska Ave. line, anyhow."

Finch received the greatest measure of applause given out by the crowd during the evening. He was staunch for the retention of the Nebraska Ave. line which some feared might be eliminated in the re-routing.

MANY WANT LINE.

A petition signed by 1,200 people requesting that it be retained, was filed in council, and referred to the committee.

The Lucas County Republican league filed its indorsement of municipal ownership, and its request for three-cent fares with union, indorsing complete municipal ownership.

The North End Improvement Association's resolutions, favoring municipal ownership and three-cent fares, was also

read and referred with all other papers bearing upon the subject to the committee on street railway franchise, which, if nothing intervenes, will meet on next Thursday evening.

Then council proceeded to the routine of the meeting.

2. That said defendants, on Wednesday, March 25th, 1914, published and caused to be published in said Newspaper aforesaid, and circulated as aforesaid, a head line extending across five columns of the first page of said Newspaper in the following language: "CAR RIDERS MAY IGNORE ORDER BARRING LOW FARE," and said defendants also caused to be published and circulated as aforesaid in said Newspaper at the same time under said head line a cartoon entitled "A DESPERATE CASE," which cartoon represented an extremely corpulent individual in bed in evident suffering, surrounded by attorneys and officers of said Street Car Company, including said Henry L. Doherty, with the expression, "GUESS WE'D BETTER CALL IN DOC KILLITS," meaning said the Honorable John M. Killits, Judge of this court; and said defendants also caused to be published and circulated as aforesaid, in said Newspaper at the same time under said head line, a news article, said defendants intending by said cartoon to convey the impression that the existence and life of said Street Car Company was in danger and could only be saved by the powers of said court presided over by said the Honorable John M. Killits; and said defendants intending by said head line, "CAR RIDERS MAY IGNORE ORDER BARRING LOW FARE," to convey to said court and the public that citizens of said city riding on the cars of said street car system would ignore and refuse to comply with any order that said court might make in said suit restraining or enjoining the enforcement of said Schreiber Ordinance. A true Newspaper copy of said head line cartoon and news article made a part of this count is as follows:

Information.

THE TOLEDO NEWS-BEE

Wednesday Evening, March 25, 1914

IDERS MAY IGNORE ORDER BARRING LOW ARE.

MADE TO TEST SCHREIBER ORDINANCE MEDIATELY AFTER THE MUNY OWNER- HIP MEET.

L FORCES PREPARE TO MOVE ON CLEVE- AND, WHERE JUDGE KILLITS ON THURS- AY WILL HEAR INJUNCTION PLEA.

S THE FRANCHISE FIGHT BOILED DOWN

ecree of Big Con fight shifts to Cleveland where, on rday at 12, counsel for the Big Con will argue for the is- ce of an order by Federal Judge Killits restraining the from enforcing the three-cent fare and five-cent rental ances.

Mass meeting of Municipal Ownership league in Mem- hall is to be held on Friday night. Plan laid that Mem- hall crowd shall remain in session until midnight, then en on cars and refuse to pay more than three cents.

Central Labor union may on Thursday night pass resolu- asking all labor men to attend Municipal Ownership ss meeting at Memorial hall.

Council's special street railway franchise committee ex- to proceed with its work in framing franchise ordinance, ardless of Big Con court fight.

It has been planned, forestalling order on an ordinance by the federal court, to beat the struggle of the three-cent-all day ordinance immediately following the mass meeting of the Municipal Ownership league in Memorial hall on Friday night, going, then, after midnight, to the Schreiber ordinance with hopes of passing it at once on Friday, or next week at the latest. That's the night Municipal Ownership league is to hold its final meeting planned to hold the crowd until midnight. Then the [illegible] is expected to offer three-cent fares on all the lines, from Memorial hall, and refuse to pay more.

A DESPERATE CASE

FIFTEEN TO SPEAK.

Councilman-at-large John Mulholland, said on Wednesday that he was to be the chairman of the Friday night municipal ownership meeting. He said there were to be perhaps 15 speakers, most of them signers of the call for the meeting, that the meeting would be held over until the new rate is effective under the Schreiber ordinance, and that then the crowd would be dismissed.

Mulholland was asked: "What if, in the meantime, the federal court issues a restraining order preventing the city from enforcing the ordinance?"

Mulholland said: "There comes a time in the history of men and nations, when things go too far. I, for one, am willing to obey any reasonable injunction, but I will obey no injunction that takes away from the people of this city their rights."

ASK WORKMEN TO AID.

It is intimated that at the meeting of the Central Labor union on Thursday night, resolution will be approved calling on all labor union men to attend the mass meeting on Friday night. These men may furnish the sinew to see to it that three-cent fares are accepted by the conductors after the new ordinance becomes effective. Bert Taylor, editor of the Union Leader, was introduced to City Solicitor Wesley Thurstin on Thursday, and has been added to the executive committee of the municipal ownership league.

"We are going over to Cleveland to fight," said City Solicitor Thurstin on Wednesday. "We will go to Cleveland at 8:40 on Thursday morning. I will be accompanied by Mr. Schlatter and Mr. Gifford, both of our office."

ASK WHITLOCK LETTER.

In the summons from the federal court Solicitor Thurstin is asked to produce a letter written by Brand Whitlock, dated Jan. 8, 1913, and relating to the temporary settlement of the question of fares to be charged by the Big Con. Besides that, he is directed to produce a copy of a certain resolution adopted by the board of directors of the Big Con, under date of Aug. 31, 1911, and filed with the clerk of council.

The resolution adopted by the Big Con directors followed the passing by council of the ordinance suggesting that the Big Con was a trespasser on the streets of Toledo, and that it pay a rental of $250 a day for the use of those streets upon which franchises had expired or get off the streets.

WAS NOT ACCEPTED.

The directors declared this to be an "alleged" ordinance giving the company the right to operate on the streets day by day, and then they resolved that the proposal be refused "and that no cars of this company be operated at any time under or in pursuance of said purported ordinance, or of any grant, permission, authority or condition therein set forth."

Charles A. Pneauff of New York, general counsel for all of Doherty & Co.'s properties, arrived on Wednesday morning from New York and immediately went into conference at the offices of Thomas H. Tracy with Tracy, Rathbun Fuller, Henry L. Doherty, Frank R. Coates and other Big Con officials.

Doherty will lead his staff "On to Cleveland" at 3:35 p. m. on Wednesday afternoon via the Lake Shore railroad.

Federal Judge Killits, who has been held in Cleveland owing to a jury case before him, has notified the local office of the United States district court that he will hear the application for a temporary injunction restraining the city from enforcing the three-cent fare and $250 a day rental ordinances at noon on Thursday.

M. E. Bump, of the Doherty New York offices, also arrived in town on Wednesday and he may accompany the Doherty party to Cleveland.

FILE NEW PLEADING.

Attorney Fuller for the Big Con has filed a cross petition in the suit of Doherty & Co. against the Big Con. The allegations in the cross petition were practically the same as those in the company's answer, filed on Tuesday. The main allegation was that the franchises on all but the Robison line do not expire until Oct. 6, 1915.

On Wednesday there didn't seem to be any reason, in view of what principals said, why the city should not proceed at the meeting of its special franchise committee on Thursday night with the construction of its proposed franchise ordinance.

BOTH SIDES WILLING.

City Solicitor Thurstin said that's what the city would like. Vice Mayor Hasenmuhl said that's what it ought to do, and T. H. Tracy, for the Big Con, expressed a belief that city and company should work together.

3. That said defendants in the same issue of said Newspaper last above referred to, on the editorial page thereof, caused to be published and circulated as aforesaid, an edi-

torial in large type across two columns of said Newspaper under the heading "MUNICIPAL OWNERSHIP THE ONLY WAY TO STREET RAILWAY PEACE," a true Newspaper copy of which editorial, made a part of this count, is as follows:

THE TOLEDO NEWS-BEE

MUNICIPAL OWNERSHIP THE ONLY WAY TO STREET RAILWAY PEACE

There can be no lasting street railway peace until the street railway system in Toledo is owned by the people of Toledo and operated for their benefit.

Never while the owners of bonds and stock had any franchise to hang onto was there any consideration of the people who rode on street cars. It was only when the franchises began to expire that the arrogant franchise manipulators began to smile sweetly at the people and to act as if the people had any rights at all in the streets or on the cars.

While the attitude of the Doherty outfit has been mildly soothing, it was only because the people of Toledo had something the promoters needed very badly in their business; and that is a franchise that will make the millions of water in their bonds and stock as good as money in the bank. And back of Doherty are the same old bondholders and the same old stockholders.

There is more water in the capitalization of the Toledo Railways & Light company than the entire city debt of Toledo amounts to. But the bonds have no market value without a franchise; and a franchise is merely a permit from the people of Toledo to use the streets, which belong to the people.

That permit or franchise carries with it the right to levy a street railway tax on the people of Toledo—not all of the people of Toledo, but merely those who don't own automobiles and have to use the street cars.

The franchise promoters want a fare that will pay dividends on all the water in the bonds and stock. And the effect is exactly the same as if all those millions were added to the public debt, and the interest paid by the people who ride on street cars.

When Doherty says the company can't carry people for three cents, he means that the company has to have a fare that will enable them to pay $800,000 a year interest on watered bonds and then pay dividends on stock that is all water—every penny of it.

And now the railway crowd has taken the franchise into the United States court. That means, practically, that the rights of the people of Toledo will be placed in the hands of a two-legged human being who happens to be a federal judge.

Just what kind of a judge this particular judge may be, and just what kind of a two-legged human being he is, we don't know. But the fact that he is a judge, and a federal judge at that, doesn't make him any more or less of a man than he was before he went on the bench.

So the people's rights here will depend largely upon how his mind works, and whether he thinks in straight lines or around corners. Anyhow, whether he is a great big man or a little bit of a man he will have a whole lot to say in finally determining the argument between the people of Toledo and the bond and stock gamblers and speculators.

For this latter bunch there will appear in court all of the high-priced legal talent that is for sale to the highest bidder —at least all of it that the Big Con thinks it will need to impress the court.

So far the people of Toledo are represented by a lawyer who has had no experience in street railway and franchise litigation, but whose purposes up to date appear to be sincere and honest on the side of the people.

And no matter how able City Solicitor Thurstin may be, the job he has tackled is big enough for the biggest lawyer in the state, with plenty of able assistance at that.

And it will be no reflection on Mr. Thurstin's ability if he calls to his assistance the very best obtainable legal talent in Toledo to help him make the fight before Judge Killits.

The council should see that he has all the assistance he needs. There are millions involved in this fight, and it means just as much to the people of Toledo as it does to the owners of the Big Con.

It is plainly the purpose of the Big Con to fight the franchise thing out in the courts. All right, let the people be as ably represented there as the Big Con.

While the people are getting ready for municipal ownership the Big Con should not be permitted to get a stranglehold on them in the courts.

That on said editorial page as shown by said Newspaper copy next hereinabove, said defendants, referring to that portion of said news article of March 24, 1914, hereinbefore referred to, that permission had been granted over the telephone by the Judge of this court to file a motion making said City of Toledo a party of said cause, published and caused to be published and circulated as aforesaid, the following:

"HOLDING COURT OVER THE TELEPHONE IS A NEW ONE, BUT IT SEEMS TO BE A HIGHLY SATISFACTORY METHOD OF DOING BUSINESS."

4. That on March 26, 1914, said defendants caused to be published in said Newspaper aforesaid, and circulated as aforesaid, a head line extending across the top over eight columns of the first page of said Newspaper in the language "KILLITS UPSETS LOW FARE ORDER," a statement wholly untrue so far as it attempts to convey, as defendants did so attempt, the impression that said Judge of this court had issued any order at all in said cause; that said defendants also caused to be published and circulated as aforesaid, in said Newspaper at the same time under said head line, a news article on said first page of said Newspaper, and continued on page five thereof, concerning the proceedings in said suit; and said defendants also caused to be published on said page five of said Newspaper of said date, and circulated as aforesaid, two other news articles, one under the heading, "JUDGE SAYS ORDER MAY BE ISSUED FRIDAY IF CONDITIONS WARRANT," and the other under the heading, "MAYOR WONT TELL HIS PLANS IF THERE'S RIOT," a true Newspaper copy of which headings and articles is made a part of this count and is as follows:

Information.

THE TOLEDO NEWS-BEE.

Thursday Evening March 26, 1914.

KILLITS UPSETS LOW FARE ORDER.

HOLDS THE SCHREIBER ORDINANCE SHOULD BE SUSPENDED UNTIL HEARING AS TO ITS FAIRNESS.

INSTRUCTS MARSHAL TO HAVE DEPUTIES READY TO ENFORCE RULING—WANTS APPRAISAL—SAYS SIX PER CENT IS A PROPER RETURN ON INVESTMENT.

HOW THE CASE OF THE PEOPLE OF TOLEDO AGAINST THE BIG CON STANDS TODAY.

The Big Con has officially notified Mayor Keller that it will "wholly disregard" the Schreiber three-cent fare ordinance which the city insists will go into effect immediately after midnight on Friday.

Judge Killits postpones hearing in Cleveland. Confined to his bed, announces that hearing of city's and company's pleas will be given in Toledo on Saturday morning and decision given, if possible, on Monday afternoon. Meantime, present conditions are to continue.

United States Marshal Lapp is to come here Friday to see that order is maintained.

Judge Killits says no temporary restraining order is necessary until Monday and trusts that "good sense of the community will not tolerate disorder."

Intimates that city will be temporarily enjoined from enforcing three-cent fare ordinance until the fare can be shown to be "reasonable."

Leaders of mass meeting at Memorial hall on Friday evening plan to try enforcement of three-cent ordinance immediately after midnight.

Big Con president makes affidavit that company would have lost $601,71 in past year under three-cent fare. Claims the company's franchise rights, except Robison system, do not expire on Friday.

The plea of the Big-Con, that the three-cent fare ordinance be prevented by injunction from going into effect after midnight on Friday, will be heard by Judge John M. Killits in United States Court here at 10 o'clock on Saturday. Decision as to a temporary injunction is promised by Judge Killits not later than Monday afternoon, if that be possible.

In Cleveland, on Thursday, Judge Killits went to his court-room long enough to inform attorneys of the postponement and assure them that no formal order has been issued in the case.

Meantime, Judge Killits says, the cars may continue to operate with the existing fares, subject to the city's right for compensation later. The judge says he trusts to the common sense of the people of Toledo to see that there is no disorder.

United States Marshal Charles W. Lapp of Cleveland has been ordered to Toledo on Friday to take charge of the situation. In ordering Lapp to take charge, Judge Killits said: "We can't afford to have any rioting in Toledo. It would be the worst thing that could happen to the prosperity of the town."

LAPP SAYS HE WILL LOOK OVER THE SITUATION.

Marshal Lapp was asked in Cleveland if he would swear in deputies or call on the United States troops. He said: "I'll not cross any bridges until I come to them. I'm going to Toledo on Friday night to look over the situation. There must be peace and quiet. The orders of the United States Court must be obeyed."

There was no hearing in Cleveland on Thursday as first set. Judge Killits was ill in bed in his room at the Hollenden with a temperature of 102. He postponed the hearing until he could return to Toledo on Saturday. Judge Killits sent a five-page typewritten communication, through Clerk Wilson of the local United States Court, for the information of the people of Toledo.

The judge says it follows that "no right exists anywhere" to compel the company to run its cars on arbitrarily imposed conditions until it is decided that such conditions are reasonable.

Courts are practically unanimous, Judge Killits says, that the company should have 6 per cent return on its investment. The fairness of three-cent fare "or the alternative of $250 per day street rental" is largely a matter of speculation with most of us, the judge said.

The city will be given opportunity on Saturday, Judge Killits says, to show that its terms are reasonable. Meantime, he asserts, the United States Supreme Court "leaves this court no power to deny the company injunctional relief until we know that it is not asked to carry an unconscionable burden."

JUDGE MAY ORDER APPRAISAL OF ROAD.

Judge Killits says that the opportunity is now presented fairly to work out a solution. "Surely," he said, "what every citizen wants is the best service at the lowest cost for fare consistent with a fair return upon every dollar honestly invested."

During the period of a temporary injunction, he says, a valuation of the property may be had and all necessary facts gathered. Meantime, the city would be entitled later to any surplus after services, expenses and a proper return upon the valuation had been met.

"If it is desired to keep up operations through a receivership," Judge Killits says, "the court will appoint two receivers, one to be suggested by the company and one by the city, with equal authority."

JUDGE KILLITS' STATEMENT IN FULL.

In his statement Judge Killits said: "We cannot interrupt the very important trial in which the court is engaged to now give to the controversy involved in the motions before us the time necessary to fair consideration. The hearing is, therefore, passed until Saturday at 10 a. m. at Toledo, and a decision of the matter then presented will be made Monday afternoon next, unless more time is seen to be necessary to a proper determination.

"Anticipating, naturally, that the present situation might confront the court at the last moment, some study of the law pertinent thereto has been had, and, assuming that the franchises expire with Friday, as the city contends, we find these principles to control, and on them we expect to act:

1.—"The city thereafter has the right to impose reasonable terms for the day by day use of the streets, and may express those terms in rates of fare, exactions of rental, provisions for service, conditions of improvement, any and all, as it chooses. If these terms are reasonable and the company attempts thereafter to use the streets, it must be held to have accepted them. Its use of the streets cannot be held to be an acceptance of unreasonable conditions.

DECLARES COMPANY HAS NO NEW RIGHT.

2.—"The company (although when using the streets without a franchise it is of the nature of a trespasser) may continue to operate its cars without the city's consent, because running street cars is in the line of use for which highways are provided, and because its kind of public service is that necessary to a large and populous community. The so-called Schreiber ordinance in its grant of a day-by-day right to use the streets after March 27, in that respect gave the company no new right.

3.—"The company can only operate after expiration of its franchises at the city's sufferance, and its right to do so ends abruptly when the city acts through a new franchise or by imposing reasonable terms for a continued day-by-day use, or by other means at the city's command.

4.—"Such use without the city's consent is under the burden of reasonably compensating the public for occupying the streets, either in concessions of fare, or payment of rental, or both, as city and company may thereafter agree upon, or as judicially determined, if a contest is forced.

5.—"The company may absolutely discontinue operation when the franchises expire, in which case it is entitled to a reasonable time to salvage its property.

6.—"This court, in this case, has the jurisdiction to enjoin the enforcement of any ordinance for the use of the streets which is in any substantial degree confiscatory, and, until it is established that terms of an ordinance arbitrarily arrived at are reasonable and not substantially confiscatory, this court may halt its operation pending inquiry.

HOLDS THERE'S NO ROOM FOR DOUBT.

"Since the decisions of the Supreme Court of the United States and the Supreme Court of Michigan, dealing with similar controversies in Cleveland and Detroit, there is no room to question any of the above propositions.

"It follows that no right exists anywhere to compel the company to run its cars upon any terms as to rate of fare or other conditions which are merely arbitrarily ordained, until it is decided that such arbitrary conditions are reasonable.

"This court could not take over the business of the company through a receiver and establish an arbitrary rate of fare, or refuse to halt, until inquiry is had, the operation of an ordinance in which an arbitrarily-determined rate of fare is fixed, without involving the court in an unlawful confiscation of property if it should develop that the rate of fare failed to

bring revenue enough to provide the service the community ought to have, pay proper wages and other necessary expenses of operation, and leave a balance equal to a fair return upon the reasonable value of the investment employed—and the courts are practically unanimous that a fair return should be six per cent.

"This company's right to protection from confiscation is precisely that of an individual owner of property.

HOLDS IT SPECULATIVE QUESTION.

"Whether or not 3-cent fare or the alternative of $250 per day street rental, in case the company declines to accept the 3-cent rate, are respectively, reasonable conditions, is very largely a matter of speculation with most of us. We may have some reason for an opinion one way or the other on the subject, but, after all, a considerable amount of arbitrary deduction controls our judgments.

"It may be, however, that the city has data and facts upon which its action in passing the ordinance of last November was based, and which sustain the terms which the company complains to be unreasonable. These facts may be presented to the court Saturday or at the final hearing of this issue, as the city elects. The Supreme Court of the United States, in the Detroit and Cleveland cases, in which facts legally similar to those involved were passed upon, leaves this court no power to deny the company injunctional relief until we know that it is not asked to carry an unconscionable burden.

"The opportunity now presents itself to fairly work out the question. The company is not protected by a franchise against the city, so that it may be compelled to be fair to the public. The city likewise cannot annoy the company beyond the annoyance incident to the end of franchise rights, which disturbance was a likelihood which the company accepted in taking the expired franchises; it knew that its definite rights would come to an end.

"Surely, what every honest citizen wants is the best service at the lowest cost for fare consistent with a fair return to the investor upon every dollar honestly invested, and there is but one way to solve the problem.

WANTS VALUE AND ALL THE FACTS.

"If we grant a temporary injunction, while it is in force, and involved in preparation for the final hearing, may be had a valuation and a gathering of all the facts which go to definitely settling the controversy over fares.

"Meanwhile, through the continuance of rates of fare now in force.

Continued on Page Five.

KILLITS UPSETS LOW FARE ORDER.

Continued from Page One.

the city will secure, from March 27, if the franchises then expire, reasonable compensation for use of its streets, for there will be charged against the revenues the expenses of the service and the amount of a decent return upon the valuation to be made, and the balance, if any, and whether more or less than $250 a day, will belong to the city.

"If it is desired to keep up operations through a receivership, the court will appoint two receivers, one to be suggested by the company and one by the city. They will be given equal authority, and steps will be taken so to co-ordinate details as to prevent opportunity to fairly say that an equal show is not afforded both parties.

"The court does not think it necessary to issue a temporary restraining order effective over Sunday next. The good sense of the community surely will not tolerate disorder.

"If this hope is shown to be baseless, we will put the operation of cars in the hands of the marshal of this court for a few days."

President Coates of the Big Con officially has notified Mayor Keller that the company would "wholly disregard" the three-cent ordinance, and would operate its cars under existing rates of fare.

Coates expressed the wish that the situation shall in no way interfere with the negotiations between the company and the city relative to a "reasonable settlement and adjustment" of the franchise question.

Preparations are going on for an enormous mass meeting at Memorial hall on Friday evening to deal with the street car situation. Leaders have been planning to hold the crowd until midnight and ask that they tender only a three-cent fare when they board the cars after that hour.

Vice-President Henry W. Ashley has called the meeting of the Lucas County Democratic club for 7:30 sharp on Friday evening, and will suggest that the meeting adjourn to the Memorial hall mass meeting.

The Central Labor union on Thursday evening will consider proposals on some action toward general attendance at the mass meeting.

MAYOR WONT TELL HIS PLANS IF THERE'S RIOT

"All I can say is that I will do everything in my power to enforce the three-cent fare ordinance to the letter," said Mayor Keller on Thursday.

The Big Con has declared that it intended running its cars after March 27 without regard to the three-cent fare ordinance, under the existing rates.

Safety Director Kapp left Toledo for Philadelphia on Wednesday night.

EXPECTS THE MARSHAL.

"What have you to say?" Mayor Keller was asked, in regard to Judge Killits' order that United States Marshal Lapp is to come to Toledo on Friday night to prevent possible rioting?"

"I have anticipated that," said Mayor Keller. "I have nothing to say about that statement at this time."

"What attitude will you take in the direction of the police department, if the people insist on Saturday morning in riding for three cents, and the conductors refuse to accept three-cent fares after the regular morning hours?"

"Peace and order will be maintained at all times," said the mayor. "That has nothing to do with the three-cent ordinance. It is an entirely separate thing. Of course, there should be no rioting."

COPS WONT CLUB.

"You don't mean to intimate that the police will be expected to beat up passengers if they insist on riding for 3 cents under a regular city ordinance?"

"I should say not," said Mayor Keller. "What effect would 100 policemen have if the people of Toledo insisted on riding for 3 cents?"

The mayor said there were so many possibilities that he wished to be excused until he had time to go into the details before commenting further.

5. That said defendants also caused to be published in said Newspaper, and circulated as aforesaid, on said March 26, 1914, with reference to the matters published in the aforesaid news articles, four editorials as follows:

"AN UNORGANIZED REFERENDUM!

"What's going to happen now?" No other one combination of words has been so frequently used in Toledo during the past two days. The probabilities are that the people will have a sort of unorganized referendum vote as to whether they will pay three cents or five cents for a ride on the street cars. And in this particular instance women and children will have a vote.

IT IS NOT EXPECTED that Big Con employes will hold down front seats in Memorial Hall on Friday night, awaiting the arrival of Hen Doherty, Tom Tracy, Rath Fuller, and Frank Coates. These boys don't belong to the Municipal Ownership league.

IN THE BALANCE.

The case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators will now be placed in the balance by a judge of the United States Court. Let substantial and not technical justice be done.

WILL the police use their clubs on car-riders who refuse to pay more than three cents car fare after Friday? They will not. Sam Jones said that the law was only what the people will back up."

said defendants intending by the publication as aforesaid of said editorials set out next hereinabove, to convey to this court and the public that if said court should issue an order on said date of March 26, 1914, as referred to in said news article of said date above referred to herein, restraining the enforcement of said Schreiber Ordinance, then the people of said City of Toledo would not regard such order, but would refuse to pay more than three cents car fare after that date, and that the police force of said city would not interfere with car riders who should attempt to ride on the cars of said street car system without paying more than three cents car fare, and they further intended to convey that notwithstanding any order which said court might make or enter in said proceedings on said date it would not be regarded by the people of said city as law, unless such people should approve the same, and said defendants in the use of said name "Sam Jones" referred to a former mayor of said city, of that name, and who was held in high esteem by a large body of the people of said city.

6. That on March 27, 1914, said defendants caused to be published in said Newspaper, and circulated as aforesaid, a cartoon and the following headlines and news articles: (a) Under the head line extending half way across the first page of said Newspaper, "ALL URGE PEACE IN THE CAR CONTEST: PEOPLE ARE ASKED TO RELY ON COURTS," a news article on said first page and continued to page six of said Newspaper: (b) On said first page of said Newspaper two other news articles, one under the heading "INFLAMMATORY SPEECHES TO BE FROWNED UPON AT MEMORIAL HALL MEETING," and the

other under the heading "MAYOR WILL BE AMONG FIRST TO TEST QUESTION;" (c) Also on said first page of said Newspaper of said date a cartoon entitled "AS WE LOSE KAPP WE GET LAPP." Kapp being the surname of the director of public safety of said city, and Lapp being the surname of the Marshal of this court, said cartoon purporting to represent, and intended to convey the impression that the Marshal of this court was hastening to Toledo from Cleveland with an order of this court pertaining to the motion aforesaid, although in fact no order of any kind had then been issued by the court in the premises, and further attempting to create the impression, and so intended, that the safety director of said city was leaving the city to avoid responsibility for the conditions anticipated to result if said Street Car Company should insist upon more than three cents fare from passengers attempting to ride on said street car system the next day, and a picture of each United States Deputy Marshals McKinley and Bartley under the heading "MARSHALS PREPARING FOR WORK. TOLEDO DEPUTIES PUT COTS IN THE FEDERAL BUILDING," all over statements representing said Marshals to have said that cots were being placed in the United States Marshal's Office in the Federal Building in said city for deputies whom they were maintaining on duty in said city to preserve order in case of rioting which might occur because of said order against said Schreiber Ordinance so represented by defendants to have been made as aforesaid by said court. A Newspaper copy of said head lines, news articles and said cartoon made a part of this count is as follows:

AS WE LOSE KAPP WE GET LAPP

THE TOLEDO NEWS-BEE.

Friday Evening March 27, 1914.

ALL URGE PEACE IN THE CAR CONTEST; PEOPLE ARE ASKED TO RELY ON COURTS.

CITY OFFICIALS AND HEADS OF THE MUNICIPAL OWNERSHIP LEAGUE URGE NO VIOLENCE.

CAMPBELL SAYS PAY FARE AND REPORT TO SOLICITOR, WHO PROMISES TO PROTECT ALL—COMPANY ANNOUNCES NO PLAN.

THE TRACTION SITUATION UP-TO-DATE.

Big Con's rights on Toledo streets expires at midnight, the city claims.

Big Con says they have 18 more months to run.

Three-cent-all-day ordinance becomes effective at 12.01 a. m.

All parties in Big Con franchise controversy appeal for no rioting.

Toledo Municipal Ownership league puts ban on inflammatory speeches at Memorial Hall on Friday night.

Executive committee issues statement urging those attending the meeting to help keep peace and order.

Big Con issues no new orders to car crews; company expects no trouble.

Solicitor Thurstin and Mayor Keller advise people against rioting.

United States Marshal Lapp coming to Toledo on Friday night to take charge of any situation that may arise.

Judge Killits' condition improved. Will be here for Saturday's hearing of Big Con application for restraining order.

City's claim that Federal Court has no jurisdiction will be the first matter to be argued at the hearing.

Mayor Keller is to be among the first to test the three-cent fare ordinance.

As to what procedure patrons of the line should take after the three-cent ordinance is in effect, Chairman W. W. Campbell of the executive committee of the Municipal Ownership league said:

"If car riders are to tender three cents, that should be done. If it is refused, the facts should be noted, the number

of the car, conductor, the circumstances and witnesses jotted down. Then the facts, with the name and address of the person refused should be forwarded to the city solicitor's office as soon thereafter as possible, for his attention."

The Big Con officials would not say on Friday just what would be done if a three-cent fare is tendered after midnight. Each situation will be up to the conductor.

* * * * *

With a crisis in Toledo's 12-year fight for three-cent fare only a few hours away and the people aroused as they seldom have been throughout the long years of struggling against the Big Con, all parties to the controversy—company, city and federal court—pleaded on Friday for no rioting or trouble after midnight, when the three-cent-all-day ordinance becomes effective.

Mayor Keller and City Solicitor Thurstin, in a statement prepared immediately upon the solicitor's return from Cleveland, urged the people to let the courts settle the matter. Solicitor Thurstin promises to protect in the courts those whose three-cent fares are refused.

The executive committee of the Toledo Municipal Ownership league, which has a mass meeting scheduled for Memorial hall on Friday night, issued a statement urging those attending the meeting and all others to avoid violence and advising them to assist in preserving peace and order. The Federal Court, the Big Con officials themselves, and all other parties in interest are advising against violence.

COMPANY ISSUES NO NEW FARE ORDERS.

No special orders have been issued to Big Con car crews as to what to do in case the people insist on paying three-cent fares. Officers and attorneys of the company went into conference at 10 o'clock on Friday morning in the office of Attorney T. H. Tracy, in an effort to determine some policy to be followed.

"We hope there will not be any trouble," said Henry L. Doherty. "We do not expect any. The company has not changed its attitude regarding the acceptance of three-cent fares. We can't accept them," he said. "We have not determined upon a policy for handling any situation that may arise. We have discussed the various situations that may arise, but I don't expect trouble and will not stand for the adoption of any policy until the last minute. It would be utter foolishness to adopt some policy now and then have to change it a few hours later. No orders have been issued to the men."

What will happen if a car full of people or any passenger tenders three-cent fare after three-cent hours, is uncertain. It is altogether likely that each case will be handled individually.

CONDUCTOR MAY USE HIS JUDGMENT.

There are no standing orders covering such a situation now. The conductor's duty is to collect the fare under the terms of the temporary arrangement in effect. The company now permits the conductor to use his judgment in handling any cases of this kind.

In most cases in the past where people have refused to pay their fares, they have been given an opportunity to leave the car. If they

Continued on Page Six.

PEACE IS URGED BY THE LEADERS

Continued from Page One.

refused they have been forcibly ejected. Car crews may be informed before midnight just what to do, but no orders have been issued so far.

George Williams, manager of the new business department of all Doherty properties, came on from New York on Friday and joined the Big Con forces here. Officers of the company, including President Coates, Henry L. Doherty, Charles A. Frueauff, Attorneys Fuller and Tracy, George Williams and others, will probably be on duty until the last car runs into the barn on Friday night.

THURSTIN'S RELIANCE IS IN COURTS

Summing up the situation on Friday morning, Solicitor Thurstin said: "If we can't ride for three cents, we will go into state court and see why we can't. We advocate nothing but peace and quiet—nothing else."

Barton Smith, former Big Con counsel, and active in the directions of the company, is hurrying home from Florida. He is now out of alignment with those in charge of the Big Con property, and it may be possible that he will be asked to take a hand in the case as advisory counsel to the city solicitor's department. Solicitor Thurstin said on Friday that he had not a word to say on that subject.

Overtures on the part of Big Con officials were made to council franchise committee at the mayor's office on Thursday night, urging that negotiations be resumed and that the three-cent fare ordinance be suspended informally for 10 days. The request was turned down by the committee.

* * * * * *

WILL MEET AGAIN ON SATURDAY

TO START NEGOTIATIONS ON GRANT

The Big Con, in its last stand before street railway franchise committee, on Thursday night, pleading that the enforcement of the three-cent-fare-all-day ordinance be postponed even 10 days, received no encouragement. The committee would have been satisfied, its agents said, even with a recommendation from the mayor and council committee as a whole, that the public abide by such a decision.

There were not enough committeemen present to make such a recommendation.

MEET AGAIN SATURDAY.

The committee will meet on Saturday afternoon, after inviting the Big Con officials to be present, and begin the actual drafting of a franchise, with the "Taylor ordinance," operative in Cleveland, as a guide.

"Wouldn't it be possible?" asked T. H. Tracy, Big Con lawyer, "to see whether we couldn't work out something in the emergency that seems to confront us just now? It seems to me that with the good feeling that exists between us we ought to be able to reach some decision in an amicable way."

The committee decided not to interfere.

"Of course," said H. L. Doherty, Big Con chief, after asking the committee to extend the time of the enforcement of the ordinance, "if we have got to go to the mat, we will go to the mat; and if we must lose our property, we will lose it, and take our medicine, that is all."

MAY HAVE "IDEAL" PLAN.

In drafting a franchise, Doherty suggested that an ordinance in which changes would not likely be made be whipped into shape first, and that then the fare be fixed, based upon the present routing of the cars. He suggested that then an "ideal" street railway system be laid out for Toledo, and that, when completed, the fare be lowered to meet the situation created by the economy of operation of such a system.

Doherty told the council comittee that the company expected only "a fair return on the valuation of the property," and said the question of bonds and stocks does not enter into it. Doherty said he controls the property.

INTENDS TO STAY.

"When we took possession of the company, we did not buy the 4 per cent bonds, but induced their owners to take preferred stock, and I insisted on a voting trust, with myself in control for five years. There are seven members in the voting trust, and I named a majority of them, and I was elected chairman of the board," Doherty said.

"It has been said that it is our intention to get a franchise here," he said, "and then get out. We never have done that. We never have let go of any property in which we have an interest. We are operators.

"We have no desire to straighten out a situation and then to turn it over to other people. In passing, it may be said that we supply some sort of public service to 176 communities and that we have no friction with more than three of them. We are handling these concerns to make money out of them, but doing it by developing efficiency.

UP TO COMMITTEE.

"We hoped that we wouldn't have to go into court. We didn't even urge the court to issue a restraining order, and I do hope we can defer this ordinance for a week or so.

"I say again, as I repeatedly have said, we are willing to try out three-cent fare, if you can convince us it will lead anywhere. Further, if you gentlemen will take the responsibility, and will tell us to do it, we will stop the cars."

Doherty said his experience had shown him that the provisions of a franchise ordinance frequently were not important from the company's point of view, except there was contained some clause that would prevent the company from raising money through the sale of bonds.

"I think this franchise in Toledo will hinge on clause three, which gives the city complete control of the service, a condition that might make the operation of the cars an expense," he said.

MARGIN IS NEEDED.

"In making the fare, we must have a margin to cover the cost of increase of capital and labor in a long term franchise. And we must have some protection in the way of readjustment of rates.

"If the city wants broad and sweeping control, then we, on the other hand, must have protection through frequent readjustment of rates to cover the cost of the service, left in the city's hands.

"So, if you could only make so much money, and you were in our places, you would like to give good, rather than poor, service. I know that it is just like waving a red flag before a bull to say so, but it is true that what you really want is good service rather than low fares.

WANT CLEAN CARS.

"People want clean cars; frequent schedules. We want to see the rate of fare such that we can give good service. We want to meet your views when crystallized in the shape of an ordinance. I should like to see Toledo with the best equipped street railway system of any city in the country. There are conditions here, which if changed, might easily bring that about."

Tracy, speaking of the Cleveland ordinance, said that it was the ablest document of the kind he had ever seen.

"There's a strong vein of human equity running through it," he said. It was the work, he said, of Newton Baker, Tom L. Johnson, Judge R. W. Tayler and representatives of the street railway company.

TAYLER PLAN FAIR.

"It treats all subjects with absolute fairness, and meets every contingency that might come up. It is really a marvelous document."

"That is true," said Rathbun Fuller, "for running all through that document you will discern that wherever there is opportunity for disagreement a plan for arbitration is provided."

The Big Con officials withdrew from the meeting with the understanding they would return on Saturday afternoon if they were invited by the city committee.

INFLAMMATORY SPEECHES TO BE FROWNED UPON AT MEMORIAL HALL MEETING

Inflammatory speeches are to be frowned upon and discouraged at the first meeting in Memorial hall on Friday night of the Toledo Municipal Ownership league.

The great crowd that is expected to be present will be urged to use only peaceful methods in the attempt to enforce its views on the traction situation, which will confront it after midnight, when the meeting will be dismissed.

John Mulholland, councilman-at-large, whose remarks about resisting fare higher than 3 cents caused much of the anxiety about trouble, on Friday fell in line with other city officials in opposing violence.

ONLY ONE SUBJECT.

W. W. Campbell, chairman of the executive committee of the league, in a studied statement on Friday, said:

"I sincerely hope that there will be no violence of any kind. There has been a set program arranged for this meeting. Municipal ownership alone is to be discussed, if we can handle it, and nothing else. We don't want any inflammatory speeches.

"We take the position that the Big Con is the lawbreaker and defiantly so, that the people of Toledo are law-abiding, and that they, at least, will not be guilty of any violence. I hope that there will not be a single instance of violence of any kind.

"The Big Con is acting in an anarchistic manner, and in notifying the mayor and the council that it will not regard the city ordinances of the city of Toledo, in total disregard of law. It is attempting to secure its objects by force, while on the contrary the people are proceeding to secure their rights in a peaceable and lawful manner."

After Councilman-at-large John Mulholland had made the public statement that he "would obey no injunction that interfered with the rights of the people," leaders in the municipal ownership movement and in the city administration, began to lay plans to shunt off Mulholland as chairman of the Friday night meeting.

STILL IS CHAIRMAN.

It was reported on Friday that Mulholland would not be shunted. As a result, unless plans are changed at a later moment, Mulholland will act as chairman of the meeting. But the managers of the meeting believe he will not invite trouble. Friends have talked to him in order to get him in line with all other city officials who advocate peaceful methods against the Big Con.

Mulholland said on Friday: "The Municipal Ownership league asks the co-operation of every loyal citizen of Toledo to assist city officials and police in maintaining order within the city limits.

DON'T BLAME CONDUCTORS.

"The street car conductors should not be held responsible by the citizens for carrying out the orders of the company. The league appeals to every man and woman in the city to constitute themselves a committee of one to see to it that the laws and ordinances of the city, state and nation are observed by everybody."

Mulholland said that the object of the meeting is to discuss municipal ownership of the street railway system now operating here "in open defiance" of a city ordinance.

Mulholland said he didn't want to be misunderstood relative to the enforcement of the ordinance.

"I have been made to appear as advocating strong methods of enforcing it. If I am out after 12 tonight—and have occasion to use a street car—I probably would tender a three-cent cash fare. If it was refused in payment I would take the conductor's number, etc., and I would quietly and peaceably and without argument get off the car, or pay the fare demanded of me."

Chairman Campbell announced that Mayor Keller has promised to speak at the meeting tonight.

The meeting will begin at 8 o'clock. Women are invited. There will be 15-minute speeches from a dozen or more people, including Assistant City Solicitors Edward H. Horton, John Schlatter and Irvin Austin and Chairman W. W. Campbell.

WONT STAY TILL 12.

No time limit will be placed upon the address of City Solicitor Thurstin.

No attempt will be made to hold the meeting until midnight, as was at first planned. It will be adjourned as soon as the speaking program and any business that may come before it is concluded.

Five hundred petitions, more or less, will be placed in circulation at the meeting, relating to the objects of the Toledo Municipal Ownership league. These objects are to provide for municipal ownership of Toledo's public utilities, especially at this time, of the street railway system, electric lighting and electric power properties.

With these petitions signed, it is the object to hurry a special election upon the proposition, to counteract the vote on a street railway franchise. The league wants no franchise granted.

MAYOR WILL BE AMONG FIRST TO TEST QUESTION.

In a proclamation on Friday afternoon Mayor Keller urged peaceful methods in testing the validity of the three-cent fare ordinance. He said he would be among the first to offer a three-cent fare. If the mayor's fare is refused, City Solicitor Thurstin, according to the proclamation, will enjoin the collection of fares greater than three cents. The proclamation:

"To the People of Toledo:

"This being the 27th day of March, after midnight tonight the ordinance passed Nov. 24, 1913, becomes effective, so that the prevailing rate of fare on cars traversing the streets of this city will be three cents with universal transfers.

ORDINANCE EFFECTIVE.

"I am of the firm opinion and I am supported in that opinion by the city solicitor, that this ordinance, sustained by the present council, is entirely effective to require the company now operating its cars upon our streets to accept a three-cent fare.

"However, the Toledo Railways & Light company through its legal representative has served notice upon myself and the city solicitor that it will not accept a three-cent fare and that it will ask for an order in the federal court restraining the city from enforcing the three-cent fare ordinance, claiming that the franchises do not expire at this time.

"Whatever merit there may be in this contention, I have the utmost confidence that the people of Toledo will be fully protected and their rights preserved by its city solicitor and his department.

"I dislike very much to have this controversy between the company and the people find its way into the courts for the reason that court procedure is too often interminable, so that the people become impatient with its delays.

"I sincerely hope that the citizens of our city will proceed in the enforcement of this ordinance in a peaceful and orderly manner, and that they will at all times remember that the city's legal department is at their service.

THE MAYOR'S PLANS.

"My own attitude in the matter will be this: Shortly after midnight tonight I shall enter a Summit and Broadway car and proffer the conductor in charge of the car three cents in currency. Upon his refusal to accept my proffer of three-cent fare I shall communicate this fact to the city solicitor, who assures me that on Saturday morning he will ask for an injunction compelling the company to accept a three-cent fare.

"I again urge upon the citizens to employ only peaceable means to accomplish the enforcement of this ordinance.

"The fight for a 3-cent fare is not merely a local one. The eyes of the entire nation are centered upon this city in this struggle; and what is accomplished here to bring about lower fares for the citizens of Toledo will go forth as an example to other cities of the United States.

"I trust that nothing may be done to reflect upon the fair name of our city."

MARSHALS PREPARING FOR WORK

Toledo Deputies Put Cots in the Federal Building.

To be ready for emergency, when the three-cent fare ordinance goes into effect, the United States marshal's office in the federal building got busy on Friday.

Cots were moved into the offices on the third floor to care for deputies, who will remain on duty all night.

Deputy Marshals Frank McKindley and Hugh Bartley of the local office announced that they would be fully prepared to preserve peace and order.

"No rioting will be permitted," McKindley said. "We will be on duty to respond to any calls that are made."

United States Marshal Lapp will arrive in Toledo at 4 o'clock and personally take charge. He will be accompanied by deputies from the Cleveland office.

That on the editorial page of said Newspaper of said date of March 27th, 1914, said defendants published and caused to be published and circulated as aforesaid under the heading "THE BIG CON'S ATTITUDE IS THE SAME OLD DEFIANCE OF THE PEOPLE," with reference to said suit among other language the following: "IT (meaning said Street Car Company), IS NOW A TRESPASSER ON MANY STREETS OF TOLEDO AND WILL BE ON PRACTICALLY ALL OF THEM BY TOMORROW MORNING. IT HAS NOW RUSHED INTO FEDERAL COURT TO TRY TO TAKE FROM THE HANDS OF THE PEOPLE OF TOLEDO THE RIGHT TO CONTROL THEIR OWN STREETS AND TO MAKE TERMS UNDER WHICH THE BIG CON MAY USE THESE STREETS." Said editorial and said language above quoted tended and was intended by defendants to give the impression to the public that said court through said judge would not protect the rights of said city and the public of Toledo in any order or decision or judgment which said court might enter in said suit, but, on the contrary, would, through an order or judgment in said suit, attempt to take away from said city and the public their right to control the streets of said city and give such control to said Street Car Company with reference to the operation of said street car system.

7. That said defendants on March 28, 1914, before said court had decided said motions for said restraining order, published in said Newspaper and circulated as aforesaid a head line across five columns of the front page thereof, "THOUSANDS ARE RIDING FREE; KILLITS HEARS BIG CON PLEA," and on page five of said Newspaper a

ARSHALS PREPARING FOR WORK

ledo Deputies Put Cots in the Federal Building

FRANK M'KINGLEY.

HUGH BARTLEY.

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head line "KILLITS HEARS TECHNICAL QUESTION AND MERITS OF BIG CON'S SUIT FOR INJUNCTION; THOUSANDS RIDING FREE." and under said head line on said first page, a cartoon entitled "DOHERTY —THE MAN WHO PUT THE CON IN CONDUCTOR," which cartoon represented the Mayor of said city as stating to said Doherty that said Mayor would not pay more than three cents fare, and was intended by defendants to give the impression to the public that not more than said three cents fare would be paid by said Mayor notwithstanding any order which might be made by said court in said suit.

8. That said defendants on March 30, 1914, caused to be published in said Newspaper and circulated as aforesaid, two news articles, one under a heading in large type "CAR CONTEST IS IN TWO COURTS; RULING DELAYED," and the other under the heading "THE FREE RIDERS NUMBER 62,000," a true Newspaper copy of which said headings and articles is made a part of this count and is as follows:

THE TOLEDO NEWS-BEE

Monday Evening, March 30, 1914.

CAR CONTEST IS IN TWO

COURTS; RULING DELAYED

ATTORNEYS FOR CITY AND BIG CON READY FOR A FIGHT BEFORE BROUGH ON INJUNCTION REQUEST.

KILLITS' DECISION BEING PREPARED AND MAY NOT BE ANNOUNCED BEFORE TUESDAY—CARS MAY BE STOPPED.

With Federal Judge Killits hard at work on his decision on the Big Con and Doherty company's application for a restraining order against the city, attorneys for the Big Con and the city were prepared to go before Judge Brough in common pleas court on Monday afternoon to argue the motion of the Big Con asking the city to make more definite and certain its two-year-old petition for injunction against fares higher than three cents.

Judge Killits will hand down his decision either late on Monday evening or early Tuesday morning, prior to his departure for Cleveland, where he will hold court in an important damage suit.

Attorneys for H. L. Doherty and the Big Con spent the entire morning in preparation for the common pleas court hearing. It was first set for 9 o'clock, but owing to the rush of other motions before the common pleas court it was continued until 1:30 p. m.

THURSTIN CHANGES PLAN.

Solicitor Thurstin at first planned to ask that the company's request to make definite and certain be granted. He expected then to file a supplementary petition setting forth the three-cent ordinance of last November.

Thurstin decided on Sunday to introduce the three-cent ordinance a little later and in a different way. Assistant City Solicitor Horton was instructed to appear before Judge Brough and oppose the company's motion. Should the motion be allowed, the city will take a short time to make its petition definite.

IS TO EMPLOY SMITH?

It was rumored that Solicitor Thurstin might ask council to supply the funds necessary to retain Barton Smith as assistant counsel in the Big Con case. Thurstin would not discuss the rumor.

"I can't see much relief in sight for the people, if Mr. Doherty's plans are executed," said the solicitor. "He has told us a number of times that it will be necessary to put in $30,000,000 in Toledo to build up this system. He can't get a cent without a franchise, and if he does get a franchise, then it means that the people who ride must make up that $30,000,000 ultimately."

Mayor Keller said on Monday that once again he had ridden without charge through the kindness of the street railway company.

Should the motion be overruled, the company will be expected to answer to the original petition, which asks the court to restrain the company from operating its cars on Toledo streets until it pays $250 a day rental in accordance with the ordinance passed in July, 1911, demurrer to which, by the company, was overruled by Judge Charles E. Chittenden—then on the common pleas bench—in a decision which sustained the right of the city to make its own terms for the use of its streets and to oust the company if it did not comply.

SUIT NOT PRESSED.

The ordinance on which the petition was based was drawn by former Solicitor Cornell Schreiber, who filed the petition asking injunction but did not press it. In the following Jan-

uary the three-cent ordinance was passed, the right to collect rental and the right to prescribe the rate of fare being based on the fact that franchise for 15 miles of the car system had expired.

Thomas H. Tracy, local attorney for the Big Con, on Saturday expressed his "fear" that the company would be obliged to stop its cars and leave the city without service if the city insisted on the three-cent fare and the $250 a day rental. It would mean operation at a loss, he claimed, and he felt it would be his duty to advise the company not to operate under such conditions.

STOPPAGE 'D BE FATAL.

Assistant City Solicitor Horton replied: "It would be absolutely fatal to the company to cease operation."

Meantime the cars are running on schedule and those who insist on paying no more than three-cent fares are riding free if they have the three pennies necessary to make the proper proffer.

During the three-cent hours morning and evening the lower fare is accepted as usual. Passengers and employes are taking the situation good-naturedly.

SUGGESTS PLAN TO TEST ORDINANCE.

This plan to get the Big Con case into other than the federal court to try the Schreiber ordinance out on its merits, has been suggested:

To tender three-cents at some other time than the regular four hours that three-cents is the rate. The tender would be refused. Then tender five cents. That would be accepted. Then have the conductor who accepted the five cents arrested on the charge of violation of city ordinance.

THE FREE RIDERS NUMBER 62,000

BIG CON LOSES SEVERAL THOUSAND DOLLARS BY RULE

More than 62,000 have been "passed" on Big Con lines since the three-cent ordinance became effective.

The figures for the business after midnight on Friday were not available but they were comparatively small. On Saturday, 22,289 out of 165,000 people rode for nothing. On Sunday the number of those who rode free jumped to 40,508 because of the large number of young people who went "joy riding."

The total for Saturday and Sunday is 62,797 people, none of whom paid anything for their rides. At 4 1-6 cents each, which is the lowest at which any of these people could have ridden if they had paid the regular fare, the Big Con has lost in the last two days $2,616.54.

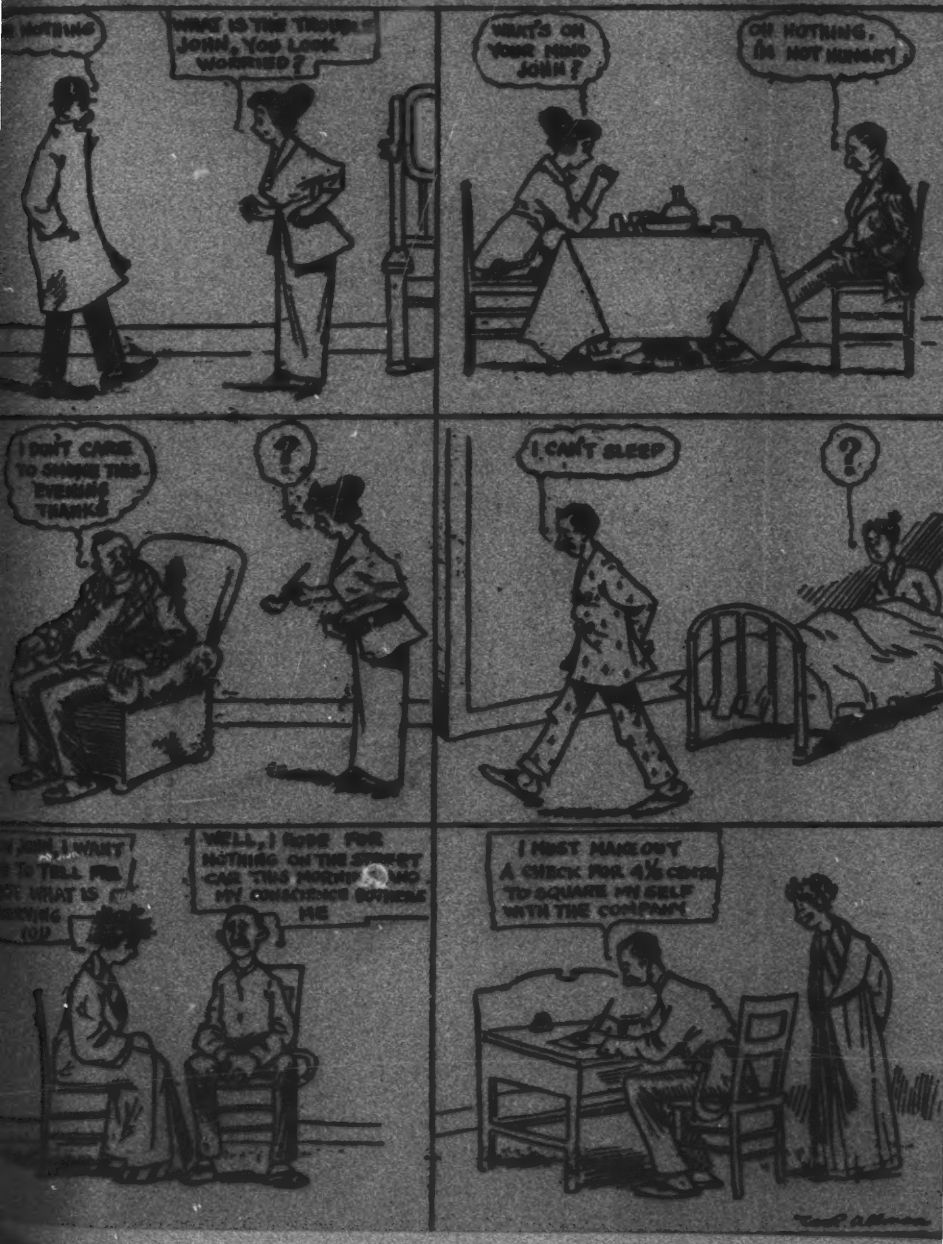
KAPP IS BACK; HE'S SURE CHIEF'S RIGHT.

Safety Director Kapp returned from Philadelphia on Sunday at noon. He conferred all afternoon with Chief of Police Murphey.

"I knew this car situation was coming up," he said on Monday, "and I had absolute confidence that the chief would handle the situation."

9. That on the afternoon of March 31, 1914, this court overruled said motions for a temporary injunction for reasons given in an opinion then filed, whereupon said defendants caused to be published on the first page of said Newspaper, and circulated as aforesaid on said date, two news articles, one on said first page and continued to page nine of said Newspaper, under the heading "DOHERTY SUGGESTS TEST OF LOWER FARES; BIG CON BROKE," and the other under the heading "KILLITS PASSES FARE FIGHT TO STATE COURTS," and therewith on said first page a cartoon under the title "HOW MANY TIMES DID YOU RIDE FREE?", a true Newspaper copy of all of which, made a part of this count is as follows:

ow Many Times Did YOU Ride Free?


OH NOTHING
WHAT IS THE TROUBLE JOHN, YOU LOOK WORRIED?
WHAT'S ON YOUR MIND JOHN?
OH NOTHING. I'M NOT HUNGRY
I DON'T CARE TO SMOKE THIS EVENING THANKS
?
I CAN'T SLEEP
?
WELL, I RODE FOR NOTHING ON THE STREET CAR THIS MORNING AND MY CONSCIENCE BOTHERS ME
I MUST HAND OUT A CHECK FOR 4½ CENTS TO SQUARE MYSELF WITH THE COMPANY

THE TOLEDO NEWS-BEE

Tuesday Evening, March 31, 1914

DOHERTY SUGGESTS TEST OF LOWER FARES; BIG CON BROKE

ASKS COMMITTEE TO PROVIDE FOR INCREASE IF LOSS IS SHOWN—RESTORES THE OLD RATE.

WONT USE FORCE IF ONLY THREE CENTS ARE TENDERED, BUT APPEALS TO ALL AS BEFORE—THURSTIN IS FIRM.

TRACTION SITUATION IN TABLOID

Franchise committee of council and Big Con officials meet to form a tentative franchise. In session all day.

Doherty willing to try three-cent fares if there's provision for increase in case of loss.

Safety Director Kapp says he will give everybody police protection.

Henry L. Doherty of Big Con on Monday night explained to city council the company's interpretation of the Killits opinion and appealed to council for police protection.

Big Con on Tuesday appealed to people, on moral grounds, to pay five cents or give "brown" tickets.

Doherty expresses confidence that the people will be entirely satisfied to allow the present rates of fare to continue until franchise agreement is reached.

None will be ejected forcibly, Doherty said.

Doherty says there is no case on record, similar to local one, which has been settled within 18 months.

Big Con chief says many have already repaid company back fares and expresses hope that others will do so.

James E. Pilliod starts movement to settle franchise controversy on the basis of seven tickets for a quarter, universal transfers and good service.

Judge Killits, in federal court, denies Big Con injunction against city restraining enforcement of three-cent ordinance. Does not pass on question of jurisdiction. Holds that ordinance is not extended by implication. Refers question to state courts.

Big Con and City Solicitor Thurstin issue statements claiming a victory in Killits decision.

Mass meeting called by Commerce club for Wednesday night.

With both sides claiming victory as a result of the decision of Federal Judge J. M. Killits handed down on Monday evening, negotiations for a franchise were resumed on Tuesday morning when representatives of the Big Con met with the franchise committee of city council in the mayor's office.

The most important development of the conference was the offer of Henry L. Doherty to install three-cent fares in a new ordinance. He asked, however, that the company be protected to the extent that if three-cent fares did not pay after a trial, the company could increase the rate.

James E. Pilliod, president of the Huebner-Toledo Breweries company, said he would immediately circulate petitions for a seven-ticket-for-a-quarter ordinance. Such an ordinance, he believes, the company would accept and he believes the rate is fair.

BOTH CLAIM VICTORY IN FEDERAL COURT RULING.

Both sides claimed to have won the majority of the important points in the Big Con restraining order decision of Judge Killits. Although the judge held that he could not grant a tems-orary injunction, the Big Con and Doherty lawyers interpret the decision to mean that the injunction was refused because the Schreiber three-cent ordinance is not in effect.

The Commerce club announced on Tuesday, through its trustees, that the situation is of such a serious nature that a mass meeting of the 1,600 members of the club has been called for Wednesday night.

In the meantime street cars are being operated and the old temporary fare arrangement, 5 cents cash, six tickets for a quarter, 3-cent fares during two hours of morning and evening, and 1 cent for children, has been restored by the Big Con.

Free rides are at an end, the company announced, after having carried approximately 80,000 free passengers since last Friday.

Solicitor Thurstin met the Big Con order for the restoration of the old rates of fare by advising the people not to pay more than 3 cents.

NO COPS IN SIGHT.

Police protection, demanded of city council and city officials on Monday night by H. L. Doherty of the Big Con, was not in evidence, although Safety Director Kapp announced that peace and order would be maintained.

The next move in the franchise fight is uncertain. Both sides have assumed a waiting attitude. Frequent conferences were held by Doherty lawyers. Various situations that may arise were discussed.

There was little trouble on the cars as a result of the Big Con order to conductors to restore old rates of fare. Conductors generally reported that the people paid the fare upon request.

CARRY CHILDREN FREE.

Although the Big Con has done away with its free ride order, the children of the parochial schools of the city were taken to the Toledo Art Museum to view an exhibit there in the interests of the city beautiful campaign. The company furnished 90 cars to transport the children free of charge. Next week the public schools will be taken to the Art Museum by the company without charge.

That Attorneys Tracy and Fuller, for the Big Con, did not agree with the Doherty plan to have a test of the three-cent-all-day ordinance was stated before the city council street railway franchise committee on Tuesday by Doherty.

Doherty said a tentative franchise

Continued on Page Nine.

DOHERTY ASKS TEST OF LOW FARES; SAYS BIG CON IS BROKE

Continued from Page One.

ordinance, as he suggested, could be drawn on one sheet of paper.

SAYS COMPANY IS BROKE.

Doherty admitted before the committee that the Big Con had absolutely no credit at all, and when Tracy asked him if that was a statement that ought not be published Doherty said he couldn't see that the situation could be much worse, even if the fact was published.

In an effort to assist the committee in its task for drafting a franchise, Doherty suggested that first, a franchise, approved as to form, be prepared; that then a three-cent rate of fare be placed in it, whether to become at once operative, for a test, or whether, when the company has provided facilities for a fair test, to be decided later.

SUGGEST NEW ROUTES.

These suggestions were made for the tentative draft:

A cross-town line be constructed, from Air Line Junction to Cherry-st., by way of Detroit-ave.

A line be built to give the people easy access to Ottawa park, preferably by way of Monroe-st. and out Bancroft-st. Other routes were mentioned.

The Indiana-ave. line be retained.

The Western-ave. line be extended from Somerset-st. west to the city limits.

CUT OUT TWO LINES.

The Maumee-ave. line be eliminated from Emerald-ave. to the terminus of the line.

The Huron-st. line be eliminated from Adams to Galena-st., and that a double-track belt be built of the Erie-st. line, on Galena, to Chase, to its terminus, and back on the Summit-st. line.

The Western-ave. line run over Emerald-ave. to St. Clair and down St. Clair, instead of Erie-st., as at present.

The Lagrange Short line be abandoned.

All lines, wherever possible, be double-tracked.

A "plug" be run on Erie-st. from Monroe-st. to Emerald-ave.

The Thurstin franchise draft provides that before any contracts can be entered into between city and company all debts owing the city by the company must be paid.

ASKS CONSIDERATION.

Tracy said that while he knew the council was opposed to a sliding scale he asked that the subject be given careful consideration.

Tracy declared that in his opinion no fare approximating three cents would be sufficient to keep up the property, through the creation of a sinking fund, and so return to the investors at the expiration of a franchise, the value of the property.

Neither the city nor the company desired to take the responsibility for the removal of existing lines. "I feel that the company now has enough enemies," said Tracy, "without taking on added burdens."

APPEALS TO PEOPLE.

Doherty issued a statement explaining the methods of appealing to the people.

"We are instructing our conductors to notify everybody who tenders a three-cent fare that they have neither the moral or legal right to ride for three cents outside of three-cent fare hours or to ride free," Doherty said.

"For the present we are simply appealing to the people of Toledo as a matter of fairness and honor to pay our prevailing rate of fare. We do not intend to forcibly exert our right unless it is absolutely necessary."

KILLITS PASSES FARE FIGHT TO STATE COURTS

It is up to the city or the Big Con to test the reasonableness of the 3-cent fare ordinances by action in the state courts. This, in brief, is the opinion handed down in federal court on Monday afternoon by Judge Killits.

The Big Con had applied for an injunction restraining the city from enforcing the 3-cent fare ordinance. Judge Killits denied the injunction.

The court did not pass on the question of jurisdiction, holding the relief sought by the Big Con could be secured in the state courts.

FRANCHISE NOT EXTENDED.

The present franchise of the company, Judge Killits ruled, is not extended by the Ironville grant.

Passengers could not be prevented from attempting to ride for 3-cent fares under present conditions, the court held.

Possession of the street car system by the United States court through a receivership, the court said, is one way in which an order of the court could be effective.

Judge Killits declared that it was up to the police to protest the company if the officials feared outbreaks.

The Schreiber ordinances generally are not unreasonable, the court said. Section 3 of the Schreiber ordinance, whicl provides that operation of the lines after midnight on last Friday shall be deemed an acceptance of the ordinance by the Big Con, is an "unreasonable" provision, Judge Killits held.

On this point the opinion said the city council, in dealing with a corporation providing a necessity to the city, should not exact anything but reasonable terms.

Whether the terms provided in the Schreiber ordinance are reasonable or not is a question to be decided in some future action.

ORDINANCE POINTS WAY.

The court said: "The provision in the three-cent ordinance, directing the city soliciotr to take the necessary legal

steps to enforce it, provides a means of testing it, and having made such a provision, no other method than the one prescribed is possible without further legislation."

All the company could hope to gain by an injunction in federal court, Judge Killits said, is the moral effect of a judgment that the ordinances are unreasonable.

No injunction, the court said, could prevent the people of Toledo from attempting to ride for three cents unless the company should press the suit for receivership. In such an event the court would take possession of the Big Con property.

COMPANY'S RELIANCE.

According to a Doherty statement the Big Con relies on these paragraphs in Judge Killits' opinion.

"That the company may run its cars day by day without the city's consent and charge fare because its service is a public necessity; it may charge a rate that will pay its expenses of operation, including proper maintenance charges, and a fair return for the use of its investment." * * *

"If these ordinances are unreasonable exactions, they are as if they never had been passed by the council and the company is not affected by their presence on the ordinance books. It may continue to operate its cars until the city ejects it, without reference to them. They are not self-enforcing.

"We could give the company no safeguard by an order of injunction which is at all necessary to it if these ordinances are unreasonable, for it may ignore them with impunity up to the entry of an order respecting them made by a court whose power the city solicitor may invoke under the ordinance themselves, and when that order is entered, the company will be in precisely the same position it would be in if this court should undertake to pass upon the force and effect of the ordinances."

That on the editorial page of said Newspaper of said date of March 31, 1914, said defendants by way of comment upon said court's opinion in said cause, published and circulated as aforesaid, an editorial as follows:

"To the layman it appears peculiar that the city cannot stop the company's cars because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights regardless of the needs of the people. Reminds us somehow of the elder Vanderbilt,"

said defendants intending to state and convey the impression through said editorial that this court in said opinion and order had held that said city could not stop said Street Car Company's cars because the public were entitled to the service or

required it, but that on the contrary said Street Car Company could stop said cars at once on expiration of said franchises, regardless of the needs of the people of said city, and said defendants thereby intended to convey to the public the impression that this court and the judge thereof like the elder Vanderbilt, had in its decisions and opinions no regard for the public. Said editorial statement as above set forth was and is a direct misrepresentation of said court's findings and holdings upon said motions, and of its reasons for refusing to grant said motions, said court holding on the contrary that said city on the expiration of said franchises could stop the operation of said street cars on the streets of said city, and could exclude said Street Car Company and its cars from further operation thereon.

10. That on or about August 10, 1914, said plaintiffs in said pending suit, and said Street Car Company defendant therein, filed motions in said suit in said court, renewing application for a temporary injunction against said city, again praying said court to enjoin the enforcement of said Schreiber Ordinance, and to enjoin said city from interfering with said Street Car Company and said partnership in collecting rates of fare which had been charged on said street railway system prior to the expiration of said franchises. Said motions came on to be heard before this court August 14, 1914, were on that day partly heard, and the hearing thereof was continued until September 8, 1914.

That defendants on August 14, 1914, caused to be published in said Newspaper on page ten thereof, and circulated as aforesaid, a news article under the heading, "TEST OF SCHREIBER ORDINANCE COMES IN U. S. COURT SEPT. 8; KILLITS PUTS BURDEN ON CITY." Said heading is misleading, untrue and a misrepresentation of the holding of said court in that it was intended to and does convey the impression that the court had placed upon said city of Toledo the burden of sustaining the reasonableness of its own legislation, namely said Schreiber Ordinance; whereas in fact all said court had theretofore done in the premises as was well known to said defendants, was to direct said city to meet in behalf of said Schreiber Ordinance, the evidence which on said August 14, 1914, had been introduced in behalf of said motions representing that said Schreiber Ordinance was unreasonable and confiscatory in its terms. A true Newspaper copy of said news article with said heading, is made a part of this count, and is as follows:

TEST OF SCHREIBER ORDINANCE COMES IN U. S. COURT SEPT. 8—KILLITS PUTS BURDEN ON CITY.

Question of the reasonableness of the three-cent-all-day fare ordinance will be tested in Federal Court on Sept. 8.

This was decided on Friday by Federal Judge Killits, at the hearing of the Big Con's motion to enjoin the city from enforcing the Schreiber ordinance and from interfering with the withdrawal of the cars from those streets on which franchises have expired.

SEES FEDERAL QUESTION.

The city's motion for dismissal on the ground that the court did not have jurisdiction was denied, because Judge Killits held a federal question had been raised by the Big Con.

The judge held.

That the burden of proving the reasonableness or unreasonableness of the Schreiber ordinance is on the city and is provided for in the Schreiber ordinance itself;

That the Big Con has a right to remove its cars from those streets on which franchises have expired;

That the city has the right to order the cars to stop, and—

That the company, by the city's sufferance, may run the cars from day to day and collect such fare as will compensate it and give a reasonable return on the real investment.

MUST SHOW REASONABLENESS.

Judge Killits said: "On Sept. 8, I will expect the city to be prepared to meet testimony that has been given; that of Carl Nau, accountant, which tends to show that the ordinance is inoperative."

Nau's testimony, if unrefuted, would show that three-cent fares, with the present mileage and the unproductive mileage, does not afford sufficient return, without respect to the amount of bonds on the property.

"This question cannot be treated in the same way as a controversy between individuals for the reason that the public has no interest between individuals. In this matter, the public has a supreme interest in keeping the facilities of transportation at work. While the railroad company occupying the streets is in some ways a tenant of the city, still all incidents that apply to tenancy of a private individual, do not apply here.

"ARE LIKE TAXICABS."

"So this company may occupy the streets after its tenancy has expired, may continue to run its cars from day to day in the same kind of right the people have to run taxicabs on the streets.

"The city has the right to say: 'You are here on sufferance. Tomorrow you stop.' But for the city to say stop before it had replaced the means of transportation would result in irreparable damage and would be a calamity. The law is that at the sufferance of the city, the company may run its cars from day to day and collect such fare as will compensate it and give a fair, reasonable return on its actual, real investment. It has the right to do that or stop its cars.

"Now the city has undertaken to measure by the Schreiber ordinance what the company may demand. So we hark right back to the proposition, 'Is the Schreiber fare reasonable?'

"As long as the company has the right to use the streets until the city says stop, somebody is clothed with the power to determine whether the fare to be collected is reasonable.

"The fact that the city has voted to own its lines has no bearing on the case so long as the city does not say stop. The city has that power, but, of course, it is not going to do that until the means of transportation are replaced."

CAN CITY REMOVE?

Judge Killits asked: "Does the city contend that it has the power to interfere with the removal of the cars from the city limits?"

Solicitor Thurstin replied that he would not admit the city didn't have the right.

Killits said: "If it does transpire that the city interferes, this court will protect the company. The company can stop the operation of its cars and remove them, but I hope that condition may never arise."

When the solicitor's staff requested more time to examine the cross bill, Judge Killits said: "I believe the city has had time, but has slept on it."

Later the judge remarked: "The surprising thing to me is that in all of these months no action to test the ordinance has been brought."

NO CHANGE IN FARES.

Judge Killits said there was no fear that a suit would be filed in any other court covering the same ground.

Assistant Solicitor Schlatter asked how the city could get testimony for the hearing of Sept. 8. Big Con attorneys announced that the city can have free "access to the books, offices and everything."

Pending the hearing of Sept. 8 there will be no change in the present fare arrangement. Free riding will continue without interference.

MEANS BIG FIGHT.

City Solicitor Thurstin said: "The ruling meant the beginning of a big fight.

"I believe there is nothing that will prevent the company's going into the hands of a receiver. I believe the groundwork is being laid now. We are placed at a disadvantage inasmuch as we will have to go into the company's camp in order to get our figures.

"If the court's decision is that 6 cents is a reasonable rate of fare, that would be the rate unless the city gave the company order to take its cars off the streets, which it would have the right to do.

"If the court decides that 3 cents is a reasonable rate, then the company must operate for that, or remove its cars."

11. That on September 5, 1914, with intent to belittle said judge of this court, and with intent to associate him and said court in the public mind with said parties in operation and control of said Street Car Company, and with one Peter Parker, defendants caused to be published in said Newspaper, and circulated as aforesaid, on the editorial page thereof on said date, the following "IF JUDGE KILLITS SHOULD BE HELD IN CANADA WHILE HENRY L. DOHERTY IS MAROONED IN WALL ST., WHAT WOULD WE EVER DO? STILL, PETER PARKER IS ALWAYS WILLING TO GIVE US GOOD ADVICE," said Peter Parker being a resident in said city, and being a person whom said defendants assumed was and is unpopular and an object of ridicule among the citizens of said city, by reason of repeated denunciations of him through said Newspaper published as aforesaid.

12. That because of the publication of said news articles, editorials and cartoons as aforesaid, by said defendants with reference to said proceedings in this court, and said misrepresentations as to what this court had done, much hostile feeling had been developed toward this court with respect to said cause, and especially among the membership of a certain organization of the citizens of Toledo, namely the local organization of socialists in said city; that at a meeting on the 6th

day of September, 1914, of said organization, resolutions were adopted and spread upon the minutes of the meeting of said organization, and were circulated in said city, condemning this court for its alleged usurpation of power belonging only to the citizens of said city, and its duly elected legislative body, and demanding that the officers of said city give protection, police and otherwise, to those who should refuse to obey any order which this court might make in the premises; that thereafter said defendants on September 9, 1914, caused to be published in said Newspaper and circulated as aforesaid, under the heading "SOCIALISTS CALL BIG CON TRESPASSER," a news article as follows:

"SOCIALISTS CALL BIG CON TRESPASSER.

Toledo local of the Socialist party has adopted a resolution which refers to the street railway company as a trespasser in the streets, and claims no judge has legal authority to compel a city to insure a corporation profit. The resolution concludes.

'We contend that the present Schreiber ordinance is prior to, and above any judge or court-made law. And we contend that no judge, federal or otherwise, has the right to unmake laws made by a duly elected legislative body. We contend further that the people of Toledo have by their votes sustained the Schreiber ordinance.'"

Said resolution as above set forth was in criticism and intended to be in criticism of this court and said judge thereof, and referred to said suit and said proceedings then pending therein before said judge, all as said defendants when so publishing the same well knew.

13. Said motions last hereinbefore referred to were further heard in behalf of said city as defendant in said suit on September 8 and 9, 1914, and were finally submitted on said last named date, whereupon said court took the same under advisement; that while said court had said motions still under advisement, and was considering particularly the question whether or not said court was authorized to issue any order at all in the premises, but without any decision reached or rendered thereon said defendants caused to be published in said Newspaper, and circulated as aforesaid, on September 10, 1914. on pages one and two of said Newspaper, a news article under the heading, "LOW FARES BANNED BY U. S. JUDGE" "KILLITS PRACTICALLY KNOCKS OUT SCHREIBER ORDINANCE," intending thereby to convey the impression that said court had decided said motions against said city and said Schreiber Ordinance, although in

fact and in truth said court had issued no order whatever in the premises, and had not reached a conclusion as to its duty therein. A true Newspaper copy of said headings and news article is made a part of this count, and is as follows:

Thursday, September 10, 1914.

LOW FARES BANNED BY U. S. JUDGE.

Both the city and Big Con on Thursday were anxiously awaiting Judge Killits' formal decision in the suit brought by the Big Con to restrain the city from enforcing the Schreiber ordinance and from interfering with the removal of the cars from those streets where franchises have expired.

The only hint as to the decision was given by the judge himself from the bench on Wednesday afternoon when the city had rested. The judge said:

SEEKS ADJUSTMENT.

"I will prepare a short memorandum setting forth the court's formal conclusions and file them within two or three days. If there is, as a result of that, an order granting the application, the operation of the order will be suspended for two or three days to permit an adjustment of hearts and minds and dispositions to the end that we may have a peaceful situation when the order is ready for enforcement."

The court made it plain that he will not fix a rate of fare which the company may charge, but will pass on the constitutional question involved and on the validity of the Schreiber ordinance.

MAY CONTINUE OLD RATES.

If the order is granted, however, the company probably will continue the rates of fare in effect prior to March 27 last —3 cents two hours of morning and evening, six tickets for a quarter during the rest of the day.

City Solicitor Thurstin is quoted as saying that if the decision is unfavorable to the city he will appeal. The case was submitted without argument.

The hearing came to a sudden close after Judge Killits interrupted City Solicitor Thurstin, during his argument, with this question:

"Mr. Thurstin, on the facts before the court are you contending that this ordinance, if attempted to

Continued on Page Two

KILLITS PRACTICALLY KNOCKS OUT SCHREIBER ORDINANCE.

Continued from Page One.

be obeyed by the company, would meet the conditions the court imposed yesterday—pay running expenses and a return on a fair valuation?"

Thurstin—"That is a matter of calculation from the facts now in the case, and our contention has merely been from the start that this ordinance that was passed Nov. 27, 1913, is a valid and legal ordinance of the city of Toledo, and is such until repealed or passed upon by a court and held to be illegal, and that the burden of proving it otherwise is and has been upon the company; that it is prima facie a valid, legal ordinance, and that the showing of the company must be conclusive and clear that it is confiscatory and that they cannot operate under it.

"That is as far as we have gone in the matter. As to whether or not they can operate under those conditions, on the testimony submitted in this case as to the figures, there is some question about."

ORDINANCE CONFISCATORY.

The Court—"You will admit, will you not—the court is entitled to your assistance in correlating the facts and getting at the effect of the testimony relating to them—I am sure that you will say to the court that it is your opinion that, if this ordinance does not provide for a revenue sufficient to meet the operating expenses and maintain the service which the city is entitled to and leave a surplus sufficient to make a fair return upon reasonable valuation of the property involved, that it is confiscatory. There is no question about that, is there?"

Mr. Thurstin—"Indeed, I would. And further than that, I would never ask council or any city official to lend a hand in asking this company to operate, if it could not make money. I believe it is entitled to it as long as it operates in the city of Toledo."

ASKS HIS JUDGMENT.

The Court—"Now, as we agree upon that proposition, what is your judgment of the facts here?"

Mr. Thurstin—"If Your Honor please, aren't you putting me in an embarrassing position?"

The Court—"No, I don't think I am. I think the court is warranted in asking you to advise the court as to what you

views are, as occupying the relation you do to the city, after a hearing in which the very fullest opportunity has been accorded the city to present the facts, not the mere theory.

DOING CITY A SERVICE.

"I think that if you, as the result of all this, entertain an honest opinion that this ordinance is a mistake, you would do the city a service in saying so publicly. I am of the opinion, knowing what I do, that the facts so impress you."

Mr. Thurstin—"I will preface these remarks—if Your Honor will pardon me—first, by reference to the remark that Your Honor made yesterday that the city of Toledo had not gotten down to rock bottom in this matter.

"The newspapers quoted that last evening rather to the detriment of the solicitor's department. The solicitor's department has put in many hours and days in this matter and has worked on it harder, perhaps, than anyone else in the city of Toledo, and we have come to but one conclusion.

OPPOSES ORDINANCE.

"Those remarks were embarrassing to this department because we felt that we had given it conscientious attention and effort, and from the facts and the knowledge that we have gained in this matter all the way through, the showing from the company's books that we have gone through, that we have delved into—and we have gone outside and got testimony and information which we have not brought into this case—and we are satisfied, except as to a few matters that might slide in in any bookkeeping, that the company has not attempted to conceal its cost of operation, and, under those conditions, and knowing the circumstances as I do now, and as I have known them from this investigation, I say that no man, if he had had that information at the time would have been warranted in either fathering or signing an ordinance of that character."

The Court—"I am glad to hear you say that, and I am glad to know, as a citizen of this city, that the city solicitor's office is not responsible for this ordinance and inherited the troubles that the ordinance has brought."

CITY HAS SUFFERED.

"There has been a propaganda in this city for years that has set up 3-cent fares as something sacred," continued Judge Killits. "The city has suffered as a result of the confusion and bitterness over this problem. The people have been misled. If the solicitor's office, after all the wealth of evidence

that has been introduced here and after its own examination, feels that the ordinance is impracticable, it has done itself and the city justice by admitting it."

Judge Killits explained why he refused to grant a temporary injunction on the Big Con previous case and he said:

"I shall assume, when it comes to the question of fact, that the city has been unable to sustain the ordinance as practicable as far as the rate of fare is concerned under existing conditions.

COUNCIL ACTED FAIRLY.

"There is no question whatever but there is a presumption that council, in passing the ordinance, acted intelligently, fairly and with a desire to impose conditions with which the company could comply. That's a presumption. But it doesn't control. In this case we find that the city of Toledo and its officers, in passing the ordinance, had the same information and the same advice that this court has now and that the ordinance is confiscatory and inoperative.

"The conclusion is almost compelling to say that the ordinance was buncombe when passed. That is no reflection on the present administration. It has done its duty in trying to have the ordinance obeyed.

SAYS COMMENTS UNUSUAL.

"These comments from the bench are unusual. So are the conditions in this city. It is unfortunate that so many people have been misled into the belief that this corporation is infringing on their rights.

"It does seem to me as a citizen that the time has come, whatever our relations may be, to attempt to relieve ourselves of prejudice and to get ourselves and our fellows into the position where we can see things clearly."

Admonished by the court on Tuesday afternoon to come in with something definite to show the reasonableness of the three-cent rate, City Solicitor Thurstin called as a witness Carl Nau, Cleveland accountant, who made the original examination of the Big Con's books for the city.

GIVES WHITLOCK LETTER.

Thurstin showed that Nau, on April 26, 1913, wrote Mayor Whitlock a private letter in which Nau said among other things, that under "existing conditions of routes and operations in Toledo, a flat three-cent fare would not be possible." The letter suggested, however, that three-cent morning and evening and seven tickets for a quarter were feasible.

"I merely wish to state to your honor, for the sake of the record, that in the city's answer to the bill in this case, certain things were denied which the law, at least, expects should be denied. The charge was made in the bill that the old administration, in passing the ordinance did not act in good faith. The law presumes that it acted in good faith. So we denied the charge.

"In denying it, we had no knowledge of any such information or advice as Mr. Nau has given to the court this morning or that he gave the former city administration before it passed the Schreiber ordinance. Mr. Horton made an examination of the correspondence in the mayor's office yesterday and failed to find any such communication."

"Did you ever discuss this letter with Schreiber or any other city officials?" asked Judge Killits of Nau.

"I did not discuss it with Schreiber, but I talked it over with members of the street railway committee of the council," Nau said.

"Did you advise them that three-cent fare was not possible?" Killits asked.

"I think I did," answered Nau.

GUESSED AT VALUATION.

The Nau letter to Whitlock fixed an estimated valuation on the property of $5,000,000, which Nau explained on Wednesday, was a guess. He said among other things in the letter that "with a different routing, larger and pay-enter cars and a general rehabilitation of the system, with normal growth, plus the stimulus which would come from lower fares, that he believed three-cent fare were possible in Toledo, assuming the price and wages did not continue to increase.

"Has there been any increase in wages or the price of materials since that time?" asked Judge Killits.

Attorneys for the company stated that the increase in wages since that time amounted to about 12 per cent and that a 10 per cent increase in material prices had been felt.

WHAT AFFECTS FARES.

In answer to questions from the bench, Nau said: "Illogical routing seriously interferes with low fare, results in over service and increased expense. There are three and as high as four lines on consecutive streets in some districts of the city in which one or two lines would suffice."

Nau gave from his 1912 report the car mile earnings on the different lines. He said that 23 to 25 cents per mile must be earned to pay expenses and give a reasonable return on the

investment. He showed that seven of 17 lines mentioned earned more than 23 cents per car mile and that one of the lines ran as low as 7.24 cents per car mile.

SAYS IT IS SCURRILOUS.

Solicitor Thurstin next objected strenuously to one paragraph in the amendment to the supplement and cross bill of the Big Con, which charges that the solicitor's office is filing damage suits against the company on behalf of those who have had trouble on the cars and making other charges, which the solicitor denounced as "scurrilous."

"You haven't even denied them in your answer," said Attorney Tracy.

The court said. "There are just two things this court wants to determine. One is the question of involving the jurisdiction of this court and the other is the question of the reasonableness of the three-cent rate."

UP TO THE COMPANY.

"But, your honor, here is a matter that reflects on the integrity of the solicitor's office," said Thurstin.

"These charges are made in the bill of complaint. You have denied them," said Judge Killits.

"Yes, but we are going to ask this court to strike out of the bill the scurrilous attack on the solicitor's office," said Thurstin.

"The burden of proof is on the other side," said Killits.

"The fact of the matter is that Mr. Gifford of the solicitor's office has filed two such cases and we are prepared to prove that," Tracy said. "Then we have Mr. Thurstin's in- three cents."

"Well, then, make your charge specific. Don't include the entire solicitor's office," cut in John Schlatter, assistant solicitor.

14. That on the evening of September 10, 1914, at a meeting of the Central Labor Union, an organization composed of accredited delegates from the various labor unions of said city, the anticipated action of this court in said suit was made the subject of severe criticism by one John Quinlivan then present in said meeting, and the impeachment of said Judge of this court was demanded in case said judge should decide the issues on said motions in favor of said Street Car Company; that on September 11, 1914, said court still not having handed down its opinion upon said matters so submitted to it but still considering the same, said defendants published in said Newspaper and circulated as aforesaid, an ac-

count of said meeting of said Central Labor Union under the heading, "JUDGE KILLITS IS CRITICISED IN CENTRAL LABOR UNION MEETING," which said account aforesaid of said meeting so published, is as follows:

"JUDGE KILLITS IS CRITICISED IN CENTRAL LABOR UNION MEETING.

Criticisms of Judge Killits of the United States Court were the feature of the meeting of Central Labor Union on Thursday evening.

Delegates applauded when John Quinlivan, James Osberger and Victor Gauthier spoke in resentment of what they believed to be the court's attitude toward the Schreiber three-cent fare ordinance.

The speakers apparently expected that Judge Killits will declare the Schreiber ordinance of no force.

James Osberger told of the efforts of organized labor in Cleveland to impeach the late Judge Ricks.

SAYS UNION MEN TIRED.

Osberger said that toward the end of the franchise fight the Central Labor union showed a lack of interest.

Osberger said that when he visited the council chamber one night early in the week he did not see a single representative of the C. L. U. present.

'The Big Con had its men there,' said Osberger, 'and as there is hardly any chance for lower fare after the way the city's case failed in the Federal Court, it is up to the members of the C. L. U. to work to prevent the Big Con from getting a franchise for more than three years.'

'The real tribunal is the tribunal of public sentiment,' said Business Agent Quinlivan, 'but as long as Judge Killits said the Big Con is right, why it must be so. I think that the C. L. U. should adopt resolutions to the effect that Judge Killits is a friend of the Big Con and other corporations.

'If the operating expenses of the Big Con were itemized fully, a large amount of money would be charged to wages of private detectives and spies,' Quinlivan continued. 'They have had as many as seven private detectives working in the city at one time to prevent the car men from being organized.'

GAUTHIER'S ADVICE.

Victor Gauthier urged that the legislative committee of the Central Labor Union watch closely the Federal Court's decision on the Schreiber ordinance, and to take such steps as it deemed necessary.

The Central Labor Union received a check for $1,400 from the fair association as its share of the gate receipts on Labor Day. Total parade expenses will not exceed $45, the committee reported.

Resolution by Councilman John Mulholland in council, to indorse the municipal ownership election and to stop further Big Con negotiations, was referred to the legislative committee."

15. That on September 11, 1914, in said suit, said court issued an attachment in contempt for said John Quinlivan, who was then the business agent of said Central Labor Union, and on September 12, 1914, and before said court had rendered any decision upon said last mentioned motions in said suit, said defendants under the guise of printing a news account of said attachment of said Quinlivan in said cause, published in said Newspaper and circulated as aforesaid, under the head line "KILLITS ACCUSES JOHN QUINLIVAN OF CONTEMPT," a news article, a true Newspaper copy of which head line and news article, made a part of this count, is as follows:

KILLITS ACCUSES JOHN QUINLIVAN OF CONTEMPT.

BASIS OF CHARGES AGAINST UNION LEADER.

These are the remarks alleged to have been made by John Quinlivan, and on which Judge Killits bases his contempt charges:

"The street car situation of Toledo is in the hands of a friend of the Rail-Light.

"Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.

"Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolutions and let our federal friend know what we think of him.

"The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.

"Impeach Killits."

Offers of assistance financially began at 5 a. m. on Saturday to pour in on John Quinlivan, business agent of the Central Labor Union, who has been cited by United States Judge Killits to appear before him at 2:30 on Saturday afternoon to show why he should not be punished for contempt of court for criticisms Quinlivan is said to have made of Killits' conduct in the hearing of a suit to invalidate an ordinance providing three-cent car fares all day.

SAYS JUDGE MISINFORMED.

Although Quinlivan had not outlined his defense on Saturday he denied that he had made several of the statements attributed to him in the citation by Judge Killits. Quinlivan said the judge apparently had been misinformed, and that the misinformation had been given by persons in the employ of interests that would like to ruin his (Quinlivan) influence.

Quinlivan, on Saturday morning, was arranging for counsel to appear before Killits on Saturday afternoon and ask a continuance for a few days so he might prepare his defense.

The citation was served on Quinlivan by Deputy Marshals Bartley and McKindley on Friday night. Quinlivan was not arrested. The issuance of the citation followed an informal investigation by Judge Killits on Friday. The court also ordered that Edward P. Usher, president, and August Smith, secretary of the Central Labor Union, appear as witneses.

NOTES ARE ORDERED.

Smith was ordered to bring notes on speeches by Quinlivan, Victor Gauthier, business agent of the machinists' union, and others at the Thursday night's meeting of the C. L. U.

The contempt charge against Quinlivan is based on remarks that Judge Killits said Quinlivan made at the meeting of the Central Labor Union on Thursday night.

The judge set out the basis of the charges in an information that he filed in his court on Friday afternoon. This information is made part of the record in the case of Henry L. Doherty and others against the Toledo Railways & Light Company.

Henry L. Doherty is the head of the company which is operating the street car and other systems of the company. The suit was brought originally to protect the interests of Doherty's partnership in any developments regarding Doherty's efforts to renew a street car franchise.

INVOLVES 3-CENT FARE.

One of these developments was an effort by Doherty, for the Big Con, to prevent the enforcement of the Schreiber ordinance, passed last November. Under this ordinance the Big Con would have been permitted to charge only three-cent fares at all hours.

Doherty and the Big Con asked Judge Killits to declare the ordinance invalid, on the ground that it would unlawfully deprive the Big Con of property. The argument was that the enforcement of the ordinance would not permit the company to operate at a profit.

This request to knock out the Schreiber ordinance was made last March. Judge Killits then refused to act and intimated that he did not have jurisdiction. Later the company renewed the request.

THE EVIDENCE BY NAU.

At the hearing last spring the company produced Carl Nau, Cleveland accountant, who had examined the Big Con books at the request of Mayor Whitlock. Nau testified in effect that the company could not operate at a profit if it were permitted to charge no more than three cents.

In August the company again asked that the Schreiber ordinance be set aside. Judge Killits ruled that Nau's testimony, which had not been contradicted, was such that the city should be required to offset it, if possible. The judge gave City Solicitor Thurstin a month to show that Nau was wrong.

Thurstin did not attack Nau's figures, but practically admitted that they were correct. Thurstin also showed that Nau had written in April, 1913, to Brand Whitlock, then mayor, that the company, under the conditions that then existed—which have not been changed—could not operate profitably at a three-cent rate.

Nau suggested in the letter that the system would have to be rerouted and better equipment secured before three-cent fares would be profitable.

THE COURT'S FORECAST.

This showing led Judge Killits to intimate that he would declare the Schreiber ordinance invalid, but that he would delay the enforcement of his order for several days so that the people could be accustomed to the change.

Such a decision as the judge intimated he would make would leave no authority for free riding. There would be no fare fixed by law for riding on the most of the car lines, because the franchises had expired.

Although no statement had been made, it was expected that the Big Con would try to collect the rates of fare in effect before the Schreiber ordinance was intended to take effect, March 27.

THE OLD FARES.

These rates, which were the result of an agreement between the Big Con and the former administration, provided for 3-cent fares from 5:30 to 7:30 a. m. and from 4.30 to 6:30 p. m. At other times the fare was to be a ticket sold six-for-a-quarter and 5-cent cash fares.

The case had not been "determined," as the courts say, before Quinlivan made the criticism attributed to him. The theory that courts may punish for contempt is based on the idea that none may improperly criticise "a pending" judicial proceeding.

"LIABLE TO OBSTRUCT."

In the information upon which Judge Killits based his order that Quinlivan appear, the judge said that Quinlivan's position as secretary and business agent of the Central Labor Union is one of great influence and that Quinlivan's remarks, therefore, "are liable to obstruct the due administration of justice," and "weaken and lessen in the estimation of all citizens influenced by said Quinlivan and his followers the proper authority of this court."

"MAY THWART JUSTICE."

The judge also declared that Quinlivan "intended that thereby this court should be intimidated in the due performance of its duty and its due authority should be limited and obstructed and its attempts to administer justice be thwarted."

The court found that the conduct of Quinlivan was calculated and intended to excite resistance and disobedience to any order of the court which might not meet with the approval of Quinlivan and his associates.

That at noon on Saturday, September 12th, 1914, and after the publication as aforesaid of said news account of said attachment against said Quinlivan as set forth in the above paragraph No. 15 herein, this court filed an order restraining the enforcement of said Schreiber Ordinance, but because of

the public sentiment aroused against said court, said partnership and said Street Car Company, thru the publication as aforesaid of the head lines, cartoons, editorials and alleged news articles in said Newspaper, said court suspended the enforcement for a period of forty-eight hours to avoid the then apparent probability that immediate operation of said order would result in disorder and rioting among a large body of people in said city influenced by the aforesaid publications and opposed to said order.

That by reason of the aforesaid acts of defendants in issuing the aforesaid publications, the aforesaid publications each and singular and in the aggregate, constituted misbehavior on the part of said defendants, so near the presence of this court as to obstruct the administration of justice, with reference to the suit hereinbefore referred to, and then pending before this court, in that said publications each and singular, and in their aggregate effect, tended and were intended to embarrass said court, and to obstruct the administration of justice by said court in a performance of its duty with reference to the issues involved in said motions, through an impression to be conveyed to said judge thereof having the duties of said court to perform that any order it might make favorable to either said partnership, or to the said Street Car Company, would meet with great public disfavor, and in that they tended to hinder said judge of said court in the exercise of a clear and impartial judgment in said cause, and in that the publications impugning the motives of said judge of said court, tended to interfere with the administration of the law by said judge of said court; and further in that they tended, and were intended to provoke among the citizens of the city of Toledo, with reference to said pending cause, an open resistance to any order which said court might make therein not approved by said defendants; and further tended and was intended to bring to the mind of said judge of this court performing the duties of said court, with reference to said suit, an impression and feeling that any order in said cause issued upon said motions, not approved by said defendants, might be met by the open resistance of a large number of the people of the city of Toledo.

Wherefore said attorney in behalf of the United States prays the consideration of the court in the premises, that due process of law may be awarded against the defendants in this behalf to make answer to the United States touching and concerning the premises aforesaid, and that the defendant, The Toledo Newspaper Company, and the defendant, Negley D. Cochran be punished by this court by fine or imprisonment at the discretion of this court, for the contempt of the court's authority as hereinbefore detailed and set forth.

COUNT II.

And the said U. G. Denman, attorney of the United States for the Northern District of Ohio, also gives the court here to understand and be informed that said THE TOLEDO NEWSPAPER COMPANY, a corporation, incorporated, organized and existing under the laws of the State of Ohio, and said NEGLEY D. COCHRAN hereinafter called the defendants, for more than five years prior to and up to and including September 17, 1914, published, sold and generally circulated within the city of Toledo and vicinity thereof, in said judicial district and division thereof, and within the jurisdiction of this court, a daily newspaper known as The Toledo News-Bee, hereinafter called the Newspaper, and said defendant Negley D. Cochran throughout said time was and still is the editor thereof; that said Newspaper throughout the current year 1914, was circulated and sold as in the first count of this information set forth; that said city is the residence of the Honorable John M. Killits, Judge of this court as stated in said first count; that a city street car system has been and is operated upon the streets of said city under the terms and conditions set forth in said first count of this information, said street car system being the same system as referred to therein; that in November, 1913, the council of said city passed an ordinance known as the Schreiber Ordinance, and being the same ordinance referred to in the first count of this information, and containing the provisions and to take effect as in said first count set forth; that on January 16, 1914, there was instituted in said court a suit in equity in which Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners as Henry L. Doherty and Company, were plaintiffs, and The Toledo Railways and Light Company, a corporation, was defendant, which suit then immediately became, and from then continuously until after the 17th day of September, 1914, remained a pending action in this court, and being No. 86 on the equity docket of said court, and being the same suit hereinbefore referred to and described in the first count of this information, and certain proceedings were thereafter taken in this court in said suit, namely the proceedings hereinbefore referred to, described and set forth in said first count of this information; and as to all the above allegations, and for more particular description as to said Newspaper and the circulation thereof, said street car system and the management, control and operation of the same, as to the passage, provisions and taking effect of said Schreiber Ordinance, as to said suit in equity, and the proceedings taken and conducted therein in said court, reference is hereby made to the first

count of this information, and the allegations there contained with respect thereto are hereby adopted in this count the same as though specifically pleaded herein.

That on September 11, 1914, in said suit pending as aforesaid, said court, through said the Honorable John M. Killits, judge of said court, before whom said suit and said proceedings therein were then pending, entered an order on the journals and records of said court, and issued an attachment in contempt for one John Quinlivan, and therein and thereunder cited said John Quinlivan to appear before said court forthwith and show cause to said court, if cause by him, said John Quinlivan might be shown, why he, said John Quinlivan, should not be punished as for contempt of the authority of said court; that upon the entering of said order against said John Quinlivan and said issuing of said writ of attachment in said suit in said court, citing said Quinlivan to appear before said court all as aforesaid, the same immediately became and from then continuously until after the 17th day of September, 1914, remained a pending action, prosecution and proceeding in contempt in said court against said John Quinlivan.

That on and after September 12, 1914, said defendants in contempt of the authority of said court, and with reference to said action, prosecution and proceeding in said court in contempt against said John Quinlivan, then pending as aforesaid, and before said the Honorable John M. Killits, judge of said court, published and caused to be published and circulated in said Newspaper as aforesaid, at the times hereinafter set forth, the Newspaper head lines, alleged news articles, editorials and other printed articles hereinafter in this count set forth and referred to, that is to say:

1. That on September 12, 1914, said defendants published and caused to be published in the home edition of said Newspaper aforesaid, and circulated as aforesaid, a head line extending across two columns, page one of said Newspaper, in the following language, "QUINLIVAN IS READY TO DEFEND KILLITS CONTEMPT CHARGES," referring thereby to said proceedings in contempt against said John Quinlivan hereinabove referred to; and said defendants also caused to be published and circulated as aforesaid, in said Newspaper at the same time, under said head line and under the title, "BASIS OF CHARGES AGAINST UNION LEADER," the following:

"BASIS OF CHARGES AGAINST UNION LEADER

These are the remarks alleged to have been made by John Quinlivan, and on which Judge Killits bases his contempt charges:

'The street car situation of Toledo is in the hands of a friend of the Rail-Light.

'Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.

'Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor union should adopt stinging resolutions and let our federal friend know what we think of him.

'The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.

'Impeach Killits.' ";

and said defendants referring to said proceedings in contempt against said John Quinlivan as aforesaid, also caused to be published and circulated in said Newspaper as aforesaid, at the same time under said head line and the above language attributed to said John Quinlivan as aforesaid, an alleged news article containing among other printed language the following: "JUDGE KILLITS" (meaning Honorable John M. Killits, judge of this court) "STATED ON SATURDAY THAT HE WOULD HEAR THE CASE HIMSELF," which said statement was untrue as defendant well knew, and a misrepresentation of the facts, in that said judge had not then at any time announced or stated that he would hear said case or proceeding against said Quinlivan.

2. That on Monday, September 14, 1914, said defendants referring to said proceedings in contempt in said court as aforesaid, against said Quinlivan, published and caused to be published in said Newspaper and circulated as aforesaid, in and as a part of a news article under the heading, "QUINLIVAN CASE IS SET FOR WEDNESDAY," the following language, "KILLITS" (meaning Honorable John M. Killits, judge of said court) "HAS ANNOUNCED THAT HE WILL HEAR THE CASE," which said statement was untrue as defendants well knew, and a misrepresentation of the facts, in that said judge had not then at any time announced or stated that he would hear said case or proceeding against said Quinlivan.

3. That on Monday, September 14, 1914, said defendants caused to be published in said Newspaper, and circulated as aforesaid, in a department thereof headed, "IN THE EDITOR'S MAIL," the following alleged communication to said Newspaper:

"The Quinlivan Case. To the Editor: Regardless of whether Judge Killits has or has not the right to sit in judgment in the Quinlivan case, it seems to me that the ethics of

the affair would lead him to either appoint some other judge to hear the evidence, or better still, have some other authority make the selection. It stands to reason that such tactics on the part of the judiciary will not have a tendency to instill in us more confidence.

(Signed) Paul G. Dennie."

And on the editorial page of said Newspaper of its issues of September 14, 1914, in black-faced-type across the top of two columns of said Newspaper, and referring to the aforesaid statement that said judge of this court had decided to hear said contempt proceeding against said Quinlivan, and referring to the aforesaid alleged communication, said defendants published and caused to be published and circulated as aforesaid, the following:

"Would it be contempt to remark that it is a peculiar situation where the officer who makes the charge, also considers the evidence, renders the verdict and imposes the sentence."

That by reason of the aforesaid acts of the defendants in issuing the aforesaid publications, said aforesaid publications each and singular and in the aggregate constituted misbehavior on the part of said defendants, so near the presence of said court as to obstruct the administration of justice with reference to said proceedings in contempt hereinbefore referred to, and then pending before and in said court, in that said publications each and singular and in their aggregate effect tended and were intended to embarrass said court, and to obstruct the administration of law and justice by said court in a performance of its duty with reference to the issues involved in said proceedings in contempt, through an impression to be conveyed to said judge thereof having the duties of said court to perform, that said judge would not be acting in good faith, and that any order he might make in said proceedings in contempt would not be made in good faith should he, said judge, proceed to a hearing of the issues and in said action or prosecution for contempt against said Quinlivan; and in that said publications tended and were intended to impugn the motives of said judge of said court, and tended to interfere with the administration of the law by said judge of said court; and further that said publications tended and were intended to provoke among the citizens of the city of Toledo, with reference to said pending proceedings in contempt as aforesaid, an open resistance to any order which said court through said judge might make therein, not approved by said defendants, and further tended and was intended to bring to the mind of said judge of this court, performing the duties

thereof with reference to said proceeding, an impression and feeling that any order in said proceeding in contempt as aforesaid not approved by said defendants, would not be fair or just to said Quinlivan.

Wherefore said attorney in behalf of the United States prays the consideration of the court in the premises, that due process of law may be awarded against the defendants in this behalf to make answer to the United States touching and concerning the premises aforesaid, and that the defendant, The Toledo Newspaper Company, and the defendant Negley D. Cochran be punished by this court by fine or imprisonment at the discretion of this court, for the contempt of the court's authority as hereinbefore detailed and set forth.

COUNT III.

And the said U. G. Denman, Attorney of the United States for the Northern District of Ohio, also gives the court here to understand and be informed that said THE TOLEDO NEWSPAPER COMPANY, a corporation, incorporated, organized and existing under the laws of the State of Ohio, and said NEGLEY D. COCHRAN hereinafter called the Defendants, for more than five years prior to and up to and including September 17, 1914, published, sold and generally circulated within the city of Toledo and vicinity thereof, in said judicial district and division thereof, and within the jurisdiction of this court, a daily newspaper known as The Toledo News-Bee, hereinafter called the Newspaper, and said defendant Negley D. Cochran throughout said time was and still is the editor thereof; that said Newspaper throughout the current year, 1914, was circulated and sold as in the first count of this information set forth; that said city is the residence of the Honorable John M. Killits, Judge of this court as stated in said first count; that a city street car system has been and is operated upon the streets of said city under the terms and conditions set forth in said first count of this information, said street car system being the same system as referred to therein; that in November, 1913, the council of said city passed an ordinance known as the Schreiber Ordinance, and being the same ordinance referred to in the first count of this information, and containing the provisions and to take effect as in said first count set forth; that on January 16, 1914, there was instituted in said court a suit in equity in which Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners as Henry L. Doherty and Company, were plaintiffs, and The Toledo Railways and Light Company, a corporation, was defendant, which suit then immediately became, and from then continu-

ously until after the 17th day of September, 1914, remained a pending action in this court, and being No. 86 on the equity docket of said court, and being the same suit hereinbefore referred to and described in the first count of this information, and certain proceedings were thereafter taken in this court in said suit, namely the proceedings hereinbefore referred to, described and set forth in said first count of this information; and as to all the above allegations, and for more particular description as to said Newspaper and the circulation thereof, said street car system and the management, control and operation of the same, as to the passage, provisions and taking effect of said Schreiber Ordinance, as to said suit in equity, and the proceedings taken and conducted therein in said court, reference is hereby made to the first count of this information, and the allegations there contained with respect thereto are hereby adopted in this count the same as though specifically pleaded herein.

That on September 11, 1914, in a suit No. 86 in equity pending as aforesaid, being the same suit hereinbefore referred to in the first and second counts of this information, there was entered by said court through said Judge an order on the journals and records thereof and an attachment was issued thereunder in contempt against one John Quinlivan, being the same order and writ of attachment in contempt against said John Quinlivan hereinbefore in the second count of this information described and referred to, and thereupon said defendants published and caused to be published in said newspaper and circulated as aforesaid certain head lines, alleged news articles, communications and other printed matter with respect to said order against said John Quinlivan, namely, the same head lines, alleged news articles, communications and other printed matters hereinbefore in the second count of this information set forth and referred to and for a more particular description as to the institution of said order and proceeding against said John Quinlivan and the purposes thereof, and as to said publications last above mentioned, reference is hereby made to said second count of this information and the allegations therein set forth with respect to said proceedings and said publications and the purposes thereof, are hereby adopted and made a part of this count, the same as though they were specifically pleaded herein.

That on September 15, 1914, said court through said the Honorable John M. Killits as Judge thereof, entered an order upon the journals and records of said court and issued an attachment in contempt for one Harry J. Howard, who then was, and still is, an editor of said Newspaper, and thereunder cited said Harry J. Howard to appear before said court forth-

with and show cause to said court, if cause by him, said Harry J. Howard, might be shown, why he, said Harry J. Howard, should not be punished as for contempt of the authority of said court for causing to be published in said Newspaper and circulated as aforesaid, said headlines, alleged news articles and other publications herein last above referred to with respect to said proceedings in contempt aaginst said Quinlivan; that upon the entering of said order against said Harry J. Howard and said issuing of said writ of attachment thereon citing said Harry J. Howard to appear before said court and said the Honorable John M. Killits, Judge of said court, all as aforesaid, the same immediately became and from then continuously until after the times hereinafter mentioned on the 17th day of September 1914, remained a pending action, prosecution and proceeding in contempt in said court and before said judge against said Harry J. Howard and being No. 1533 of the criminal docket of said court.

That upon September 17, 1914, and while said action, prosecution and proceeding in contempt No. 1533 on the criminal docket in said court as aforesaid against said Harry J. Howard was still pending as aforesaid, said defendants in contempt of the authority of said court, and with reference to said action, prosecution and proceeding, No. 1533 of the criminal docket in said court in contempt against said Harry J. Howard, published and caused to be published in said Newspaper and circulated as aforesaid, on the first page of said Newspaper aforesaid, the following double column editorial or newspaper article:

"THE NEWS-BEE AND JUDGE KILLITS

As we see it the public interest in the contempt proceedings instituted by Judge J. M. Killits against The News-Bee and Managing Editor Howard, depends not so much on what the judge sees fit to do or not do, as it does upon how his action may affect the policy of The News-Bee.

It has been the policy of this newspaper in the past to discuss frankly and fearlessly all questions of public policy and interest. And without regard to whether our statement of the truth, as we see it, pleases or displeases this, that or the other citizen—even though that citizen happens to be what is commonly known as a judge.

We have no desire to influence the conduct of any judge in interpreting the law in any particular case. And we have no intention of permitting any judge of any court to influence our judgment in defending the public interest.

We don't want to censor judicial decisions, and will not permit judicial censorship of The News-Bee's editorial policy.

We have notions of our own about contempt of court. One of them is that nobody but the judge himself can inspire public contempt of the court over which he happens to preside.

The people in this country, because of patriotic education from early youth, start out with respect for our Federal Courts. When that respect changes to contempt, it can be only because of the conduct of a judge or judges.

We have said before that after all, Judge Killits is no more than a two-legged man like any of the rest of us. We repeat it for the sake of emphasis. No judge judges by divine right even though he holds his job for life.

No judge is infallible or omnipotent. No physical or mental change takes place when he is lifted from the practice of law and placed upon the bench, that transforms him from a human being into a god.

And what kind of a judge he turns out to be depends almost altogether on the kind of man he was beforehand.

We shall not discuss now the merits of this particular case. We do not discuss cases while they are pending, with any purpose of interfering with the administration of justice.

We prefer to give every judge free rein to make either a Solomon or a monkey of himself, if either be possible.

But once the case is decided, we shall say and publish whatever we think best for the public good, whether it pleases or displeases any judge—even if that judge happens to be John M. Killits."

The above said article tended and by said defendants was intended to belittle and ridicule said court and said judge thereof with reference to said proceeding then pending against said Harry J. Howard and said publication constituted misbehavior on the part of said defendants so near the presence of said court as to obstruct the administration of justice with reference to said proceedings in contempt against said Harry J. Howard then pending before, and in said court, and further, said publication tended and by defendants was intended to provoke among the citizens of the city of Toledo with reference to said pending proceedings in contempt as aforesaid, an open resistance of any order which said court through said judge might make therein not approved by said defendants and thereby and otherwise obstruct the administration of law and justice in said court.

Wherefore said attorney in behalf of the United States prays the consideration of the court in the premises, that due process of law may be awarded against the defendants in this behalf to make answer to the United States touching and concerning the premises aforesaid, and that the defendant The Toledo Newspaper Company, and the defendant Negley D.

Cochran be punished by this court by fine or imprisonment at the discretion of this court, for the contempt of the court's authority as hereinbefore detailed and set forth.

U. G. Denman,
United States Attorney.

DEMURRER OF NEGLEY D. COCHRAN TO INFORMATION.

(Filed Nov. 12, 1914.)

Now comes Negley D. Cochran, one of the defendants herein, into this court and demurs to the Information filed herein and to each of the counts thereof for the following reasons:

1. That this court is without jurisdiction to punish this defendant for his acts, or any of them, as the same are set out and charged against him in said Information, or in any of the counts thereof.

2. That the acts of this defendant as set out and charged against him in said Information, or in any of the counts thereof, do not, nor do any of them, constitute a contempt of this court.

3. That the acts of this defendant as set out and charged against him in said Information, or in any of the counts thereof, do not constitute misbehavior in the presence of this court or so near thereto as to obstruct the administration of justice.

4. That this court has no power to punish this defendant on account of the acts stated and charged against him in said Information, or in any of the counts thereof.

5. That said Information, and each count thereof, is not sufficient in law, and that he, the said Negley D. Cochran, is not bound by the law of the land to answer to the said Information or to any of the counts thereof.

Kohn, Northrup, Ritter & McMahon,
Lawrence Maxwell,
J. W. Curts,
Attorneys for Defendant.

DEMURRER OF THE TOLEDO NEWSPAPER COMPANY TO INFORMATION.

(Filed Nov. 12, 1914.)

Now comes The Toledo Newspaper Company, a corporation organized and existing under the laws of the State of Ohio, one of the defendants herein, into this court and demurs to the Information filed herein and to each of the counts thereof for the following reasons:

1. That this court is without jurisdiction to punish this defendant for its acts, or any of them, as the same are set out and charged against it in said Information, or in any of the counts thereof.

2. That the acts of this defendant as set out and charged against it in said Information, or in any of the counts thereof, do not, nor do any of them, constitute a contempt of this court.

3. That the acts of this defendant as set out and charged against it in said Information, or in any of the counts thereof, do not constitute misbehavior in the presence of this court or so near thereto as to obstruct the administration of justice.

4. That this court has no power to punish this defendant on account of the acts stated and charged against it in said Information, or in any of the counts thereof.

5. That said Information, and each count thereof, is not sufficient in law, and that it, the said The Toledo Newspaper Company, is not bound by the law of the land to answer to the said information or to any of the counts thereof.

Kohn, Northup, Ritter & McMahon,
Lawrence Maxwell,
J. W. Curts,
Attorneys for Defendant.

ORDER OVERRULING DEMURRERS.

(Entered by Judge Killits, Dec. 4, 1914.)

The court having considered the briefs of counsel in the case upon the demurrers of each respondent to the information herein, does overrule each demurrer to each count of the information, to which action of the court each respondent is allowed and hereby takes an exception.

It is now ordered that each respondent answer the information herein on or before December 19, 1914, and that this cause be and it hereby is assigned to be heard upon the information and answers and such testimony as may be offered on Monday, December 28, 1914, at ten o'clock in the forenoon.

MEMORANDUM OPINION OF COURT ON DEMURRERS.

(Filed Dec. 4, 1914.)

Killits, J.:

The brief in support of respondents' demurrer cites no authority not known and considered by the court when the order was entered directing the filing of an information. In fact, in an oral discussion touching the issues of this case, had between respondents' counsel and the court, the authorities now again urged were under consideration.

We feel, as when the order was entered, that the trend of interpretation, by application, of the language of Section 268, Judicial Code of the United States,—"so near the presence of the court as to obstruct the administration of justice",—manifested by every decision of federal courts of all grades, after the Robinson case, 19 Wallace, from In re May, 1 Fed., 737, to United States vs. Huff, 206 Fed., 700, including, in fact, In re Daniels, 131 Fed., 95, to apply, as a criterion of application of the statute, the directness

of the tendency of the act to effect a pending cause rather than its mere physical or topographical nearness to a sitting court, justifies our view that interference by improper newspaper comment with a pending case may be within the statute.

It is nothing that no federal court has ever hitherto said so. The language of the statute does not exclude the proposition. One Court of Appeals (In re Daniels, 131 Fed., 95, 99) in a dictum recognized such an application of the statute. If the statute covers an attempt to influence the court by letters delivered and received by the judge at his house and out of court hours, as decided in the Huff case, an effort to work the same effect by publications spread broadcast in the judge's home city, on principle, is likewise. A sentiment created by such publications may be made to pervade the court room itself (State vs. Hornell, 80 Conn., 668, 69 Atl., 1057), and becomes a misbehavior "analogous to a contempt in the presence of the court" (Telegram Newspaper Company vs. Commonwealth, 172 Mass., 294, 44 L. R. A., 159).

The constitutional guaranty which newspapers invoke protects private citizens as well. The Toledo News-Bee has no privilege to express its opinions which the humblest private citizen does not enjoy. We are all privileged to freely write, print or speak our views, with an equal responsibility to account for an abuse of the freedom, whichever medium we employ.

The Supreme Court has not only never followed but in fact has discredited the narrowing of the statute effected as pure dictum in Ex Parte Robinson, 19 Wall., 505. If that were not so, the court's refusal to review (198 U. S., 582) McCaully's case (25 D. C. Appeals, 404) is inexplicable, because jurisdiction in that case was questioned on the precise point.

As to Ex parte Poulson, 19 Federal Cases, 1350, upon which respondents so largely depend, an extended examination, which need not be set forth here, both as to its assumptions of fact and as to its reception by the courts, results in depriving it of authority. The two reasons for Justice Baldwin's extraordinary application of the statute to the facts before him have both been held invalid, one by the Supreme Court in Savin, Petitioner, 131 U. S., 267, where it is held that one may be attached for contempt for an offense for which he may be indicted, and the other by the Supreme Court in McCaully's case, supra, as well as by all of the cases involved in the series referred to above.

Poulson's case has no importance as an interpretation of an ambiguous statute (194 U. S., 88), for there is no indefinite language here; nor may it be argued that it was a decision establishing a right which public policy will not permit to be divested. It plainly deals with a proposition which is not finally to be settled until the highest court speaks (17 Wall., 473; 124 U. S., 694).

State courts having statutes similar to that of the federal provisions have passed on the question of law raised here, notably in Ohio. (Myers vs. State, 46 Ohio State, 473; approvingly cited, Patterson vs. Colorado, 205 U. S., 454). It cannot be that an Ohio newspaper may with impunity do that to an Ohio federal court which it might not safely do to an Ohio state court, the two jurisdictions having substantially the same contempt provisions. (Sec. 12,136, General Code of Ohio.)

Respecting the claim that the publications involved are not competent in character to sustain a charge of interference with court proceedings, respondents' argument proceeds on the consideration of each as an isolated act. On this basis each is urged as within the privilege of the press to comment on court proceedings. It is readily seen that a very large part of most of the articles set up in the information is entirely free from possible criticism, and it is conceived that the pleader is not insisting otherwise. Some of the publications which, if in any instance they stood alone, would readily be negligible, become offensive as part of a series, while others, notably, for an instance but not an exclusive one, the publications of March 25, 1914, need no light from outside to exhibit impropriety. To emphasize, in one issue, as there, by exaggerated headlines and repetitions in subheads and text, a project to defy, by mass action of the people, any court order offensive to the paper's policy, quoting, in a news article headed: "Car riders may ignore order barring low fare," the utterances in that behalf of a city official, and detailing his plan to hold a mass meeting, with a suggestion of aid to be given the project by public organizations; to publish in connection a cartoon intended to further depreciate the plaintiffs in the cause there pending and, naming the judge of the court, intended to exhibit the court as the refuge and last resort of the plaintiffs in a "desperate case"; to editorially sneer at the fact that a purely technical and formal order in the case had been allowed over the telephone, a circumstance which involved absolutely no prejudice to any interest in the case; to berate, editorially, to the extent of nearly two columns, the plaintiffs in

the case as "arrogant franchise manipulators" smiling "sweetly at the people," wanting "a franchise that will make the millions of water in their bonds and stock as good as money in the bank," opposing three cent fare only because that rate will not pay "interest on watered bonds and then pay dividends on stock that is all water—every penny of it"; and, in the same editorial, to picture the judge of the court as "a two legged human being" whose quality of mind and purpose is uncertain, but who, nevertheless, "will have a whole lot to say in finally determining the argument between the people of Toledo and the bond and stock gamblers and speculators," and who, because of his possible infirmities of mental and moral make-up, may be impressed unduly by the "high priced legal talent that is for sale to the highest bidder" employed by plaintiffs, unless council authorizes employment of the "very best legal talent obtainable in Toledo" to help the city solicitor care for a "job" which is "big enough for the biggest lawyer in the state, with plenty of able assistance at that," otherwise plaintiffs may "get a strangle hold" on the people from the judge whose consideration of "the peoples' rights will depend largely on how his mind works, and whether he thinks in straight lines or around corners," and "whether he is a great big man or a little bit of a man," is to present so unique a combination of offensive publication touching a cause to be determined in court as to cause this one issue to justify the allegation of the information that respondents' acts "tended to embarrass" the court, and tended to provoke among citizens of Toledo "an open resistance to any order" in the pending cause not approved by the News-Bee.

The very intensity of public feeling which is suggested as justifying respondents' action is a factor which aggravates the offensive character of the home edition of their paper of March 25, from which we have quoted. It needs no argument to show what might be the effect of this upon the ordinary reader of the paper who depended upon it for his impression of men and measures, and who had already followed the paper in its intense hostility to the plaintiffs in the pending cause, nor is it difficult to see that he might assume that the paper endorses the statement which it publishes as the utterance of a city official, that "no injunction which takes away from the people of this city their rights" needs be obeyed, and that it fears that such a "strangle hold" on the people may be obtained by the plaintiffs from a weak court.

If it were simply to give the news that a mass meeting in Memorial Hall with an anarchistic afterpiece was proposed, the most ordinary consideration of a court's relation to the public and issues before it would have suggested a publication devoid of the incendiary extravagances of large headlines and unnecessary repetitions, while, if the paper deemed it a public duty to demand, in the same issue which advertised a public meeting to test the three-cent ordinance, "restraining order or no restraining order by the federal court," that the city increase the strength of its professional representation in the court, there surely was no reasonable or respectable call to belittle the judge whom the paper, the next day, depicted as holding "in the balance the case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators."

If it is still insisted that the publication of March 25 by itself is not subject to the charge that it encouraged resistance to a possibly unpopular order of the court, the impropriety of this language is unquestionably manifest when it is compared with the publications of the day preceding and the day subsequent. On March 24 the paper treated the traction matters to the extent of five or six columns, a large part of which dealt with the meeting of the council of the evening before when that body, by a majority vote, directed that the socalled Schreiber ordinance be enforced after the following Friday night. In the article much prominence is given to the fact that a large and representative audience of citizens intensely partisan against any proposition to delay matters was present, and to the other fact that, when a councilman urged moderation and expressed a fear that disorder might result if the company should refuse to abjectly surrender to the ordinance without testing its validity, there was so much disorder manifesting disapproval of his proposition to be moderate that the services of the officials of the council and the police were necessary. It is very plain, if we may trust the News-Bee's own account, that the situation was exceedingly tense. This account, however, opens with a statement of the fact that the company had appealed to the federal court for protection against the alleged invalid ordinance, and in that connection the article repeats four times, twice in headlines, the statement that the city solicitor would protect any citizen who decides for himself what is the proper thing to be done after Friday night. Assuming that it was proper, as a matter of news, to represent the city solicitor as taking this quite impos-

sible attitude of offering his official services to protect a citizen from the results of a purely private action—a thing which was utterly beyond the official authority of the city solicitor—it still remains to be explained why the paper, if it had no ulterior object, should have felt the necessity of repeating this absurdity in three additional statements, making the proposition a headliner. We doubt whether counsel for respondents are serious when they say, in excuse of this, that it was merely a representation to the public of the attitude of one of its officials, and that the promise was properly made in the capacity of city solicitor offering the protection of his office.

On the 26th this paper assures its readers editorially that the police of the city will not use their clubs on car riders who refuse to pay more than three cents after the following Friday, quoting and apparently endorsing the proposition attributed to ex-Mayor Jones "that the law was only what the people will back up."

So we have in the publications of March 24, 25 and 26: (1) A note that cool-headed officials fear public disorder on Friday night. (2) An assurance by the paper that he who contributes to that disorder by insisting on the observation of an ordinance against the plain right of the company to appeal to the courts for its testing will be protected in whatever he does by the law officer of the city. (3) In the next days' issue, the assurance to individual readers of the paper, who are encouraged to take the law into their own hands by the advice of the previous day, that they will be supported by a goodly number of citizens of the city who propose to meet in a large meeting at Memorial Hall, and after listening to sundry advise as to their assumed rights, will take the law into their own hands en masse "restraining order or no restraining order by the federal court," coupled with an editorial assurance that the court itself, unless it decides against the company, is entitled to little or no respect; and finally, in the issue of the 25th, timorous readers who are hesitating whether they should join the crowd are assured that they may fear no restraint from the officers of the city appointed to keep the peace and that they need not be deterred by a lingering respect for law and authority because, forsooth, the time has come when law is only what popular passion, aroused by just such publications as these, deems for the moment should be respected.

The quotations we have just made are from the news and editorial articles, too long to be set out in full, of the News-Bee for the three days named. We have used them

precisely as the context allows and to the meaning which is obvious in the extended articles. There is no ambiguity about the language, wherefore intent to effect what the language seems to effect is presumed. (Ex parte Nelson, 157 Southwestern, 794.)

Involved in this question is not at all the right of the paper to print the news, or make comment on current matters, even court proceedings. Its right in that behalf is unquestioned. It is when it so sensationalizes the news and libels litigants and the court in such a way as to obviously embarrass the proper determination of a pending case, that it exceeds its immunities. The line is clear, is observed by other newspapers, and may, and should be, honored by all.

We are unable to read the English language properly, and have certainly not acquired any judgment of human nature and of the effect upon popular prejudice of the influence of a great newspaper improperly exerted if we now incorrectly adjudge this conduct to be offensive in the highest degree as tending to take from the constituted authorities, the courts of the land, the adjudication of questions dispassionately and, in effect, to make a newspaper a judge absolutely of questions of law and fact. When such a thing is done with reference to a case then pending in the courts, its tendency to embarrass the administration of justice is too obvious to need discussion.

We need not, at this time, further discuss the facts admitted by the demurrer. It may be provident, at some other time in the progress of the case, to extend an opinion on the law and facts; at present, it is sufficient to express the view that the several counts set up publications which, as against the general demurrer, pass the bounds of propriety as comment on and report of court proceedings in a pending cause, because they tend to interfere with the administration of justice therein.

The court takes this occasion to extend its thanks to counsel that this somewhat unpleasant case is allowed to proceed impersonally to the dispassionate consideration and determination of a question of great public importance.

John M. Killits,
Judge.

December 4, 1914.

ANSWER.

(Filed Dec. 19, 1914.)

Now come Negley D. Cochran and The Toledo Newspaper Company, a corporation, and for answer to the First, Second and Third Counts of the Information, say:

They admit that The Toledo News-Bee was published and circulated as alleged; that the defendant, Negley D. Cochran, was and is the editor thereof; and that the City of Toledo was and is the residence of the Honorable John M. Killits, Judge of this Court.

They admit that for many years prior to March 28, 1914, said street car system in the City of Toledo was operated and controlled by The Toledo Railways & Light Company and its predecessors in title under franchises granted by the Council of said City; that with the close of March 27, 1914, practically all the franchises owned by said street car company on the streets of said city expired, and that since said time said street car company has operated its said car system without franchise on said streets; that on November 24, 1913, the Council of said City duly passed an ordinance known as the Schreiber ordinance, to go into effect March 28, 1914, on said expiration of said franchises of said street car company, of which ordinance the following is a copy:

"AN ORDINANCE

Pertaining to the terms upon which The Toledo Railways & Light Company may operate its street cars on streets and public places in the City of Toledo and authorizing the City Solicitor to take legal steps to enforce this Ordinance.

Whereas, the franchise rights of The Toledo Railways & Light Company, as the successor in title to operate street railways on certain streets in the City of Toledo, expire on the 27th day of March, 1914:

Now, Therefore,

Be It Ordained By the Council of the City of Toledo, State of Ohio:

Sec. 1. That upon the following terms and conditions, and upon no other, consent, permission and authority are hereby granted to The Toledo Railways & Light Company to continue from day to day only, after March 27th, 1914, to operate its cars on the streets and portions

of streets whereon franchises expire on said March 27th, 1914, the operation to be in conjunction with all the rest of the street railway lines of The Toledo Railways & Light Company in the City of Toledo, so that the whole system will be operated as a unit and as one continuous system.

Sec. 2. The operation of street cars after March 27th, 1914, on the streets and parts of streets whereon franchises expire on March 27th, 1914, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to March 27th, 1914, and shall be further subject to all the conditions imposed on the said The Toledo Railways & Light Company by an ordinance passed July 26th, 1911, pertaining to the operation of street cars by The Toledo Railways & Light Company, and shall be further subject to the condition that the charge which said The Toledo Railways & Light Company may make and receive for one continuous passage over the entire or any part of its street railway system, including the streets upon which franchises have expired, and those upon which franchises shall not have expired, shall not exceed the sum of three cents for each passenger, nor the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled without extra charge to transfer from the route upon which he shall have paid his fare to any other route except in a substantially opposite direction on a route parallel or substantially parallel to said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations, passing the point of transfer, and that the service be regulated by the City of Toledo.

Sec. 3. This ordinance is subject to the revocation or amendment in whole or in part, expressly or by implication, at any time at the will of council, and the council may at any time increase the obligations of the company for permission to operate upon said lines covered by said franchises, and the continuing by said company of the operation of its cars on lines covered by said franchises expiring March 27th, 1914, shall be deemed an acceptance of this ordinance and all the terms thereof.

Sec. 4. In case The Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly and according to the tenor or effect thereof, then the City Solicitor be and he is hereby authorized and directed to take such legal actions as may be

proper and necessary to enforce the provision of this ordinance or require the company to abandon the streets covered by the franchises above mentioned.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

Defendants admit that said street car company promptly notified said City that it would not accept the terms of said ordinance, and would not operate its cars on the streets of said City thereunder.

The defendants aver that said The Toledo Railways & Light Company is, and since the spring of 1913 has been, controlled by said Henry L. Doherty & Company. Defendants do not know whether said control was in pursuance of a contract for the management of said street car system as alleged in the information, or if so, what the terms of said contract are, and, therefore, deny the allegations of the information in that respect and call for proof of said contract.

For more than ten years the street railway service in said city has been and is one of its most important municipal problems. The service rendered, the cars, tracks, treatment of employes and rates have all been the subject of much complaint and public discussion.

Under the leadership of Samuel Jones, who, as Mayor of said City came to be known as "Golden Rule Jones," it was one of the first cities to inaugurate non-partisan municipal government and to break away from the domination of national parties in municipal affairs, which many students believed to be one of the chief causes of the unsatisfactory record of municipalities in this country. He inaugurated what came to be known as the "Independent" movement, and stimulated interest in the street railway problem and municipal affairs generally. When he died in 1904, Brand Whitlock succeeded him as Mayor and continued Jones' policies as to street railways and other municipal matters. He and his associates were always elected on Independent tickets and this non-partisan municipal administration continued until January, 1914. In 1913 Whitlock announced that he would not be a candidate for re-election, and in the fall of that year a division arose in the Independent movement, resulting in two Citizens Tickets. There was also put in the field a straight Republican ticket, which was elected, resulting in a partisan municipal administration in said City for the first time in more than ten years.

In the meantime, the neighboring City of Cleveland, Ohio, had established a three cent fare on its traction lines.

The people of Toledo believed that they were entitled to equally favorable terms, and each of the parties at said municipal election in 1913 pledged its candidates to three cent fares. Some believed that this could best be obtained through municipal ownership, and others believed that it could be obtained through proper street railway franchises to be granted by the City Council on the expiration on March 27, 1914, of the existing franchise.

The Toledo News-Bee is, and always has been, an independent newspaper, advocating non-partisan municipal government, lower street railway fares, and municipal ownership of public utilities. For many years it had opposed, by news articles and editorials, the granting of various franchises which the company had requested from the City, and it published a large amount of matter on this question during the spring and summer of 1914, because the street railway company was then urging that it be granted a franchise at once. The street railway company used more than fifty full pages of advertising space in both The Toledo Blade and The Toledo Times, discussing the opinion of the court, the three-cent fare, free riding and the need of a franchise. Much space was given to the Doherty suit in all the Toledo newspapers because of the great interest which the people had shown in matters affecting the street railway question.

Defendants admit that on January 16, 1914, Henry L. Doherty & Company began a suit in this court against The Toledo Railways & Light Company, being Case #86 in Equity. It was Creditor's Bill based upon a judgment recovered by the plaintiffs therein against the defendant therein on January 16, 1914, and the return of execution on the same day nulla bona. It prayed for the sale of the defendant's equity of redemption in all of its property, including said street railway, and for the payment of plaintiffs' judgment from the proceeds of such sale; for the appointment of a receiver; for directions to such receiver on and after March 27, 1914, and until the repeal of the Schreiber ordinance to discontinue the operation of the defendant's cars over the tracks covered by the franchises which had theretofore or upon that date would expire; and in the event plaintiffs' claim was not paid, or said property was not sold or disposed of prior to March 27, 1914, that plaintiffs might then be permitted to have the City of Toledo made a party defendant, and that such orders then be made as would protect the defendant and its equity of redemption from the injustice of enforcing or attempting to enforce the provisions of said Schreiber ordinance relat-

ing to the fares specified therein, a copy of which ordinance was set in the Bill of Complaint. No proceedings were taken in said case until March 24, 1914, on which day the plaintiffs, by leave of court, filed an amendment and supplement to their Bill making the City of Toledo defendant thereto upon the pretense that it was a necessary and proper party to a complete determination of the cause. In said amendment and supplement plaintiffs prayed to enjoin the City of Toledo from enforcing any of the terms and provisions of the Schreiber ordinance relating to the fares to be charged by The Toledo Railways & Light Company after March 27, 1914, alleging that said company could not accept said rates of fare and that to stop the operation of its cars after March 27, 1914, would paralyze the business and social activities of the city, greatly inconvenience and injure the public, and be of great and irreparable damage to The Toledo Railways & Light Company and to the plaintiffs as lienholders.

On March 24, 1914, the Toledo Railways & Light pany filed its answer to the bill of complaint and also a cross bill against the City of Toledo. Said Toledo Railways & Light Company in said answer admitted all the allegations of the bill except as to the date of the expiration of certain franchises, and averred that if this court would grant an order restraining the City of Toledo from enforcing said Schreiber ordinance and said ordinance of July 26, 1911 referred to in the Schreiber ordinance, it would not be necessary to appoint a receiver. In said cross bill said Toledo Railways & Light Company averred that it could not accept the rates of fare and the terms and provisions of the Schreiber ordinance or said ordinance of July 26, 1911, and that to stop the operation of its cars after March 27, 1914, would paralyze the business and social activities of the City of Toledo, and would greatly inconvenience and injure the public, and be of great and irreparable damage to said Toledo Railways & Light Company, and prayed that the City of Toledo be enjoined from enforcing any of the terms and provisions of said ordinances, and that they be declared null and void and of no effect.

On March 30, 1914, said Toledo Railways & Light Company filed an amended cross bill against the City of Toledo, alleging that said City was attempting to enforce said Schreiber ordinance, and praying that it be enjoined from so doing.

On August 7, 1914, The Toledo Railways & Light Company filed an amendment and supplement to its amended cross bill, asking the same relief and that the

City be enjoined from interfering with the withdrawal by said company of its cars from the streets of Toledo upon which its franchise had expired, and storing them in such place as it might deem best, alleging that the provisions of the Schreiber ordinance were unreasonable, unjust, fraudulent, and confiscatory, and, if enforced, would compel said company to conduct its business without fair remuneration, and that the rates of fare and terms of said ordinance were violative of the fifth amendment and the fourteenth amendment of the Constitution of the United States, and, therefore, null and void.

On August 14, 1914, the City of Toledo filed a motion to dismiss the action as against it on the ground that the court was without jurisdiction thereof, which motion was overruled by the court on August 15, 1914.

On August 22, 1914, the city filed its answer to the bill and amended bill of Henry L. Doherty & Company; also its answer to the cross bill and supplement thereto of The Toledo Railways & Light Company, in none of which did it pray for any affirmative relief against the plaintiffs or The Toledo Railways & Light Company, but insisted that the suit was collusive and that the court was without jurisdiction of said cross bills against it, or to enjoin the enforcement of the Schreiber ordinance; averred that the plaintiffs in said suit were under contract with the defendant company to operate its property and were in charge of the defendant's money and property; that the interests of the defendant company and of the plaintiffs were co-extensive and alike; that the suit was brought without any intent to collect said judgment, but only for the purpose of bringing the City of Toledo into this court, to suspend the operation of its ordinances under the laws of the State of Ohio, and that this court was without jurisdiction to enjoin the enforcement of said ordinances.

On September 12, 1914, the court entered an order, enjoining the City of Toledo, its officers, agents, employes and all other parties and persons having notice, from asserting, enforcing or attempting to assert or enforce the rates of fare or any of the terms and provisions of the Schreiber ordinance and from interfering with the withdrawal by the defendant company of its cars from the streets of the City of Toledo.

The plaintiffs never applied in said suit for the appointment of a receiver, or for the sale of the property. The defendants refer to the record of said suit as appears in this court, and to the opinions, pleadings, motions and orders, on file therein, with the same effect as if they were set forth in this answer.

The defendants, upon information and belief, aver that this court was without jurisdiction to grant the relief prayed for by either the plaintiffs or the defendant company with respect to said Schreiber ordinance, or to enjoin the enforcement thereof by the City of Toledo, or to make said order of injunction entered on September 12, 1914; that said suit was instituted collusively and by prearrangement with said The Toledo Railways & Light Company, which was the real party in interest, for the purpose of relieving it from resorting to the State Court, and of bringing into this court a controversy of which it did not have jurisdiction under the Constitution and laws of the United States; and the defendants submit that it appeared when the court entered said order of September 12, 1914, that the suit, so far as it sought relief against the City of Toledo, had not at anytime involved a dispute or controversy within the jurisdiction of the court.

ANSWER TO THE FIRST COUNT.

Defendants adopt the allegations hereinbefore made as part of their answer to the First Count. They admit that they caused to be published in said The Toledo News-Bee, on the days charged, the several headlines, quotations, editorials, articles and cartoons set out in the First Count.

1. They deny that the language quoted from the publication of March 24th, 1914, tended, or by defendants was intended, in connection with said headlines or otherwise, to convey to the public, or give the public to understand that the City Solicitor would protect any person who might refuse to pay more than a three-cent fare on said street car system, notwithstanding any order, finding or holding which this court might enter or make in said suit. They refer this court to its opinion filed in said suit on March 30th, 1914, in which it held that it could not issue an order to run against individual citizens unless the court should complete its possesison by the appointment of a receiver. Defendants say that said news article of March 24th, 1914, was a fair and accurate account of the matters therein reported.

2. They deny that they intended by the cartoon set forth in Paragraph 2 to convey the impression that the existence and life of said street car company could only be saved by the powers of this court, or that they intended by said headline, "CAR RIDERS MAY IGNORE ORDER BARRING LOW FARE," to convey anything to this court, or to convey to the public that citizens of said city riding on the cars of said street car system would ignore or refuse to

comply with any order that this court might make in said suit, restraining or enjoining the enforcement of said Schreiber ordinance. Said headline was part of the headlines which were intended by defendants to summarize, and which do fairly summarize, the news item, which is a fair and accurate account of the matters therein reported.

3. The publication, "HOLDING COURT over the telephone is a new one, but it seems to be a highly satisfactory method of doing business," copied in Paragraph 3, does not refer to permission granted over the telephone by the judge of this court to file a motion making the City of Toledo a party to said cause, but to the granting of said motion by telephone. Said order was of vital importance in said case, and defendants submit that said paragraph was fair and reasonable comment upon the granting of an order of such vital importance over the telephone.

4. The words, "KILLITS UPSETS LOW FARE ORDER." set forth in Paragraph 4, are part of a headline intended by the defendants to summarize, and which does fairly summarize, the statement of Judge Killits' addressed to the people of Toledo published in full thereunder. Defendants deny that said headline is untrue or that they intended to convey, or did convey, the impression that he had issued an order in said cause. The three news articles set out in Paragraph 4 were fair and accurate accounts of the matters therein reported.

5. Defendants deny that they intended by the editorials set out in Paragraph 5 to convey anything to this court, or to convey to the public, that if said court should issue an order on March 26th, restraining the enforcement of said Schreiber ordinance, the people of the City of Toledo would not regard such order, but would refuse to pay more than three cents car fare after that date, or that any order which this court might make or enter in said suit would be disregarded by the people of the said city. Defendants admit that in the use of the name "Sam Jones" they referred to a former Mayor of the City of Toledo who was held in high esteem by a large body of the people of said city. The defendants again call the attention of the court to its opinion filed on March 30th, 1914, in which it held that it could not issue an order to run against individual citizens unless the court should complete its possession by the appointment of a receiver.

6. Defendants, referring to the cartoon set out in Paragraph 6, admit that Kapp was the surname of the Director of Public Safety of Toledo and Lapp the name of the Marshal of this court. They deny that said cartoon

purported to represent, or was intended to convey the impression that a formal order of any kind had been issued by the court. Said cartoon had reference to the statement made by Judge Killits on the preceding day when he ordered said Lapp to go from Cleveland to Toledo to take charge of the situation in Toledo, and said:—

"We can't afford to have any rioting in Toledo. It would be the worst thing that could happen to the prosperity of the town."

The three news articles in Paragraph 6 were fair and accurate acounts of the matters reported therein.

The following is the editorial published under the heading, "THE BIG CON'S ATTITUDE IS THE SAME OLD DEFIANCE OF THE PEOPLE," a part only of which is quoted in Paragraph 6, to-wit:—

"THE BIG CON'S ATTITUDE IS THE SAME OLD DEFIANCE OF THE PEOPLE.

In a letter to Mayor Keller, President Coates, speaking for the Big Con, says:

'You are hereby respectfully notified that this company will wholly disregard the ordinances and consider and treat the same and each and all of their terms, provisions and conditions as wholly void and of no force nor effect.'

There is nothing new in the attitude of the Big Con toward the people of Toledo, thus defiantly put into black and white.

That has been the attitude of the company ever since it got control of the streets of Toledo.

Every franchise granted has been a contract between the people of Toledo through council and the street railway company. But the rule has been for the company to live up to just so much of the contract as suited the whim, caprice and pleasure of the officers who happened to be in charge.

Every franchise has called for modern equipment and good service, and much of the time the people have been given rotten service and rotten equipment.

Up until the time when franchises began to expire, the policy of the company was arrogant and insolent. It tried to control politics so it could have a council that would represent the company instead of the people.

It has maintained lobbyists to influence the council, and agents to influence juries. It has fought in the courts terms of contracts it had agreed to in order to secure franchises.

It is now a trespasser on many streets of Toledo, and will be on practically all of them by tomorrow morning. It has now rushed into the federal court to try to take from the hands of the people of Toledo the right to control their own streets, and to make terms under which the Big Con may use those streets.

The conduct of the Big Con throughout all the years of war with the people of Toledo has been such that there is no assurance that it will live up to the terms of a new contract with the people of Toledo, even if one is made.

There can be no peace, no satisfactory rates and service in Toledo until the people have taken entire possession of their own streets and are owning and operating the street railway system for the benefit of the people, instead of for financial gain of foreign bondowners and stockholders."

Defendants deny that said editorial, or the language quoted therefrom in Paragraph 6, tended, or was intended, to give the impression to the public that this court, through said Judge, would not protect the rights of said city and the public of Toledo in any order or decision or judgment which said court might enter in said suit, or that said court would, through an order or judgment in said suit, attempt to take away from said city or the public their right to control the streets of said city, and give such control to said street car company with reference to the operation of said street car system.

7. Defendants deny that the cartoon set out in Paragraph 7 was intended by defendants to give the impression to the public that not more than three cents fare would be paid by said Mayor, notwithstanding any order which might be made by this court in said suit. The headlines copied in Paragraph 7 were appropriate to the news articles over which they appear, and said articles are fair and accurate accounts of the matters reported therein.

8. The articles set forth in Paragraph 8 were fair and accurate accounts of the matters reported therein and proper comment thereon.

9. The news articles published on March 31, 1914, set forth in Paragraph 9 are fair and accurate accounts of the matters therein reported. If the paragraph quoted from the editorial page of March 31, 1914, does not correctly state the decision of the court, the error was unintentional. The defendants, in making said editorial comment, had reference to claims made by the plaintiff and by The Toledo Railways & Light Company as well as to the opinion of Judge Killits filed on March 30, 1914, in which he said:—

"The statement heretofore made by the court is too long to repeat in full, but it is not open to modification. It may be briefed in these words: That the company may run its cars day by day without the city's consent and charge fare because its service is a public necessity; it may charge a rate that will pay its expenses of operation, including proper maintenance charges, and a fair return for the use of its investment. Out of any revenues which may remain it must compensate the city for the use of the streets, if the city demands. The city through the council may impose terms for this temporary use, which are binding upon the company only when they are reasonable, having regard to the circumstances peculiar to the local situation, but the city may at any time summarily deprive the company of the use of the streets except to salvage its property, and the company may stop its cars at any time if it deems such course profitable to it."

The defendants deny that they intended to convey to the public the impression that this court, or the judge thereof, had in its decisions and opinions, no regard for the public.

10. Defendants deny that the heading published on August 14, 1914, copied in Paragraph 10, was intended to convey, or does convey, the impression that the court had placed upon the City of Toledo the burden of sustaining the reasonableness of the Schreiber ordinance, or that said heading, taken in connection with said news article, is misleading, untrue or a misrepresentation of the holding of said court. Said news item, which is a fair and accurate account of the matters reported therein, shows that Judge Killits announced that on September 8, 1914, he would expect the City to be prepared to meet the testimony theretofore given by Carl Nau, accountant, which tended to show that the ordinance was inoperative, and that said testimony of Nau, if unrefuted, would show that three cent fares, with the present mileage and the unproductive mileage, does not afford sufficient return without respect to the amount of bonds on the propery. Said heading, taken in connection with said news article, indicates that the court had put upon the city the burden of overcoming the testimony so given by said Nau.

11. The paragraph published on the editorial page on September 5, 1914, copied in Paragraph 11, was not printed in large type, but in lower case body type. It had no tendency or effect, so far as said suit was concerned, and was not published with intent to belittle the judge of this court.

12. The defendants deny that hostile feeling had been developed toward this court, among the members of the local organization of Socialists, or others, with respect to said suit, by the defendants. They had no connection with the alleged proceedings of said organization at their meeting on September 6, 1914, and have no knowledge thereof except such as is reported in the news article set out in Paragraph 12.

13. The news article published on September 10, 1914, set forth in Paragraph 13, is a fair and accurate report of proceedings in open court before Judge Killits on September 9, 1914, and said headline was warranted thereby. The article and headlines taken together show that while the judge had not entered a formal order, he had come to a conclusion adverse to the Schreiber ordinance.

15. The news article and headline published on September 12, 1914, set forth in Paragraph 15, is a fair and accurate account of the proceedings in this court against said John Quinlivan and of other matters connected therewith and reported therein.

The defendants do not know for what reason the court, in entering its order on said motions for a temporary injunction in said suit on September 12, 1914, made it effective commencing Tuesday, September 15, 1914, except as indicated by the following statement made by Judge Killits in open court on September 10, 1914, to-wit:

"The operation of the order will be suspended for two or three days to permit an adjustment of hearts and minds and dispositions to the end that we may have a peaceful situation when the order is ready for enforcement."

The defendants deny any suspension of said order was necessary because of public sentiment aroused against said court, said partnership or said street car company through any publications by the defendants, or that there was any probability that the immediate operation of said order would result in disorder or rioting because of any publications by these defendants, or for any other reason.

The defendants deny that the publications made by them set forth in the First Count, either separately or in the aggregate constituted misbehavior on the part of the defendants so near the presence of the court as to obstruct the administration of justice with reference to said suit. They deny that said publications, separately or in their aggregate effect, tended or were intended to embarrass this court and to obstruct the administration of justice by this court in the performance of its duties with reference to the issues involved in said motions, through an impression to be conveyed to said judge that any order he might

make favorable to said partnership or to said street railway company would meet with public disfavor. They deny that said publications tended to hinder the judge of this court in the exercise of a clear and impartial judgment in said cause, or that they impugned the motives of the judge of this court or tended to interfere with the administration of the law by said judge, or that they tended or were intended to provoke among the citizens of the City of Toledo resistance to any order which said court might make therein, or that they tended or were intended to bring to the mind of said judge an impression and feeling that any order in said cause issued upon said motions, not approved by the defendants, might be met by the open resistance of the people of the City of Toledo.

ANSWER TO SECOND COUNT.

The defendants, in addition to the allegations hereinbefore made as part of their answer to the Second Count, say:

They admit that on September 11, 1914, in said case of Henry L. Doherty & Company vs The Toledo Railways & Light Company Judge Killits entered an order on the journals and records of this court and issued an attachment in contempt for one John Quinlivan, and therein and thereunder cited said Quinlivan to appear before this court forthwith and show cause to the court why he should not be punished as for contempt of the authority of the court. They deny that upon, or by the entering of, said order, or the issuing of said writ of atachment in said equity suit in this court, said proceedings against Quinlivan became a pending action, prosecution or proceeding in contempt in this court against said Quinlivan; on the contrary, they say that said proceedings were null and void.

1. The headline and the portion of the news article published on September 12, 1914, set out in Paragraph 1, is part of a news article concerning proceedings against the said Quinlivan in this court and matters connected therewith, which is a fair and accurate account thereof.

The defendants deny that the statement that "Judge Killits stated on Saturday that he would hear the case himself," was untrue or a misrepresentation of the facts.

2. The defendants deny that the statement in the publication of September 14, 1914, set forth in Paragraph 2, that Judge Killits anounced that he would hear the case, was untrue or a misrepresentation of the facts.

3. The defendants deny that the publications set forth in the Second Count, separately or in the aggregate,

constituted misbehavior on their part so near the presence of the court as to obstruct the administration of justice with reference to said alleged contempt proceedings against Quinlivan. They deny that said publications, separately or in their aggregate effect, tended or were intended to embarrass said court, or to obstruct the administration of law and justice by said court in said alleged contempt proceeedings through an impression to be conveyed to said judge that he would not be acting in good faith, or that any order he might make in said alleged proceedings would not be made in good faith should he proceed to a hearing thereof. They deny that said publications tended or were intended to impune the motives of said judge, or tended to interfere with the administration of law by him, or that they tended or were intended to provoke among the citizens of the City of Toledo, with reference to said alleged contempt proceedings, resistance to any order which said court might make therein, or that they tended or were intended to bring to the mind of said judge an impression or feeling that any order in said alleged contempt proceedings would not be fair or just to said Quinlivan.

ANSWER TO COUNT THREE.

The defendants, in addition to the allegations hereinbefore made as part of their answer to the Third Count and the allegations in their answer to the Second Count with reference to said alleged proceedings in contempt against Quinlivan, say:

They admit that on September 15, 1914, Judge Killits entered an order upon the journals of the records of said court and issued an attachment in contempt for one Harry J. Howard, who was then, and still is, an editor of The Toledo News-Bee, and thereunder cited said Howard to appear before said court forthwith and show cause why he should not be punished as for contempt of the authority of said court for causing to be published in said newspaper said publications with respect to said proceedings in contempt against said Quinlivan. They deny that upon the entering of said order against said Howard and the issuing of said writ of atachment, the same became, or continued to be, a pending action, prosecution or proceeding in contempt in this court. They submit on the contrary that this court had no jurisdiction of the subject matter or of said pretended prosecution and proceeding in contempt.

They deny that said editorial published on September 17, 1914, tended, or was by them intended, to belittle or ridicule this court, or the judge thereof, or that said publication constituted misbehavior on the part of the defendants so near the presence of the court as to obstruct the administration of justice with reference to said alleged proceedings in contempt against said Howard or that it tended, or by defendants was intended, to provoke among the citizens of the City of Toledo, with reference thereto, open resistance to any order which said court might make therein, not approved by the defendants, and thereby, or otherwise, obstruct the administration of law and justice in this court.

Lawrence Maxwell,
Kohn, Northup, Ritter & McMahon,
Jay W. Curts,
Counsel for Defendants.

State of Ohio,
County of Lucas, ss:

Negley D. Cochran, one of the defendants, and E. B. Conliss. Vice President of the defendant, The Toledo Newspaper Company, being severally duly sworn, say that they have read the foregoing Answer and know the contents thereof, and that the same is true, except as to the matters therein alleged on information and belief, and they believe such matters to be true.

Negley D. Cochran,
E. B. Conliss.

Sworn to before me and subsribed in my presence this 19th day of December, 1914.

(Seal) C. A. Collin,
Notary Public in and for Lucas County, Ohio.

Lawrence Maxwell,
Kohn, Northrup, Ritter & McMahon,
Jay W. Curts,
Counsel for Defendants.

ORDER APPOINTING HON. WILLIAM L. DAY, SPECIAL COUNSEL.

(Entered Dec. 22, 1914, By Judge Killits.)

The court, by consent of the District Attorney, hereby designates Hon. William L. Day, a member of the bar of this court, to assist in the prosecution in this court and elsewhere of the information in this cause filed, and now comes the said William L. Day and accepts the aforesaid designation.

TRIAL BEGUN.

(Order Entered by Judge Killits, Dec. 28, 1914.)

This day came the United States Attorney on behalf of the United States, and came also the defendants, accompanied by counsel, at the bar of court.

And the court having heard the testimony adduced in chief by plaintiff and the testimony adduced in part by defendant further proceedings were continued until tomorrow morning at nine-thirty o'clock.

TRIAL COMPLETED. CASE SUBMITTED.

(Order Entered Dec. 29, 1914, by Judge Killits.)

This day again came the United States Attorney on behalf of the United States, and came also the defendants, accompanied by counsel, at the bar of court and the trial proceeded.

And the testimony and the arguments having been completed, said case was submitted to the court.

ORDER FINDING DEFENDANTS GUILTY AND FIXING PENALTIES.

(Entered by Judge Killits, Jany. 23, 1915.)

This cause having, on the 29th day of December, 1914, been heard upon the evidence and arguments of counsel, and having then been submitted to the court for consideration, and the court, having considered the same, does find, under the first count of the information herein, that the several publications hereinafter indicated by their respective dates and other references thereto, were published in The Toledo News-Bee of said respective dates, and in the Home Editions thereof save as to the publication described in paragraph 10 hereunder; that each of said publications identified in paragraphs numbered 1 to 10, inclusive, hereunder, had reference to and affected the issues of a certain case then pending in this court, entitled Henry L. Doherty et al., vs. The Toledo Railways & Light Company et al.; that the several issues of the said newspaper containing said publications were circulated generally in large numbers in and about the city of Toledo; that the publication and circulation thereof, respectively constituted and was misbehavior so near the presence of the court as to obstruct the administration of justice in said cause, in that each of said publications tended to, and were calculated to, embarrass the court trying said cause and to obstruct the administration of justice by said court with respect to said cause, in the manner and form as alleged in the information herein; that the misbehavior in respect of said publications abided not only in the language employed but in the manner in which the several statements, opinions and observations were set forth typographically, and in the several cartoons and illustrations accompanying them, respectively; that said publications, considered in their aggregate and cumulative effect and as they tended to affect the consideration to be given to each other individually, considered as a series of publications, constituted misbehavior with respect to said pending cause so near the court as to obstruct the administration of justice in the particulars set forth in said information; that because thereof the respondents, The Toledo Newspaper Company, a corporation, as alleged in the information, and the respondent Negley D. Cochran, as editor in chief under said corporation of said newspaper, are respectively guilty of criminal contempt of the authority of this court; that the publications so found to constitute severally and collectively criminal contempt of the authority of this court as aforesaid are:

1. March 24 1914, the news article headed "Big Con fights three-cent fare in Federal Court," because of the emphasis therein by unnecessary repetitions in headline and elsewhere given to the alleged assurance of official protection to car riders who would insist on the terms of the so-called Schreiber ordinance in advance of court action in the case thereon then pending herein and in connection with the statement of the appeal by Doherty & Company and the street car company to this court against the said ordinance, said statement beginning: "With Henry L. Doherty directing operations, the Big Con got busy early Tuesday in its effort to evade the Schreiber three-cent fare ordinance." Also because of the cartoon then printed entitled: "At the last ditch," and because of the language of said statement.

2. March 25, 1914, the news article dealing with traction matters and said pending case because of the heading: "Car riders may ignore order barring low fare," in connection with the prominence given by repetitions, typographical embellishments, quotations from public officials and otherwise to the project to hold a meeting on the following Friday night and thereafter to have the audience at that meeting "test the strength of the three-cent fare all day ordinance" to go into effect at midnight "restraining order or no restraining order by the Federal Court;" the observation that labor union men would attend this meeting and "may furnish the sinew to see to it that three cent fares are accepted by the conductors after the new ordinance becomes effective;" the editorial headed: "Municipal ownership the only way to street railway peace," both as to its reflection on and denunciation of the suitors in the said cause pending in this court and as to its reflection on the judge of this court with reference to said cause; the editorial paragraph relating to "holding court over the telephone;" and the cartoon entitled: "A desperate case."

3. March 26, 1914, the statement in large headline type that "Killits Upsets Low Fare Order," and the four editorial paragraphs, those headed, respectively: "An Organized Referendum" and "In The Balance," and those, respectively, dealing with "Hen Doherty" (plaintiff in the case here), "Tom Tracy, Rath Fuller" (counsel in the pending case) "and Frank Coates" (manager of the street car company, a party in the pending case), regarding the proposed meeting on the following Friday night; and assuring those who should "refuse to pay more than three cents car fare after Friday night" that the police would not use their clubs on them, and that, in that connection in the opinion of Sam Jones, "the law was only what the people will back up;" and the repetition that "preparations are going on for an enormous mass meeting at Mem-

orial Hall on Friday evening to deal with the street car situation" to be aided by the Central Labor Union to hold until midnight, after which the crowd will be asked to insist on riding for three cents.

4. March 27, 1914, the cartoon representing the marshal of this court hastening to Toledo purporting to bear an "order from Judge Killits" and the safety director of the city of Toledo departing for Philadelphia; the editorial under the heading: "The Big Con's Attitude the Same Old Defiance of the People," and also the paragraph therein to the effect that the street car company "is now a trespasser" which "has now rushed into Federal Court to take from the people of Toledo the right to control their own streets."

5. August 14, 1914, the statement in the heading of the news article dealing with the unfinished hearing in this court of the pending traction case, the heading being: "Test of the Schreiber Ordinance Comes in U. S. Court Sept. 8; Killits Puts Burden on City."

6. September 5, 1914, the editorial paragraph associating the judge of this court with Henry L. Doherty, one of the plaintiffs in the pending case, and concluding: "Still Peter Parker is always willing to give us good advice."

7. September 9, 1914, the publication, with reference to said pending case, of the proceedings of the Toledo Local of the Socialist Party under the title: "Socialists Call Big Con Trespasser."

8. September 10, 1914, the statement on the first page, in large type, as a heading to an account of the proceedings in this court in the pending traction case, the statement being: "Low Fares Banned by U. S. Judge."

9. September 11, 1914, the account of the proceedings of the Central Labor Union, with reference to said pending case, under the heading: "Judge Killits is Criticised in Central Labor Union Meeting."

10. September 12, 1914, the news article on the first page of the first city or noon edition of said paper, under the heading, in large type: "Killits Accuses John Quinlivan of Contempt," with reference to the manner in which the alleged remarks of said Quinlivan concerning the court were printed in a so-called "boxing" and given thereby special prominence, under the heading: "Basis of Charges Against Union Leader."

The court finds the respondents, and each of them, to be incontempt of the authority of this court in the manner and form as set forth in the second count of the information, for the publication in The Toledo News-Bee of September 14, 1914, and the circulation thereof in and about the city of To-

ledo, of the statement in a news article treating of the proceedings in contempt pending in this court against one John Quinlivan, being a substantial repetition of a statement to the same effect in said newspaper of September 12, 1914, that "Killits has announced that he will hear the case," and in said issue and in that connection for the publication of the alleged communication entitled "The Quinlivan Case," purporting to be signed by one Paul G. Dennie and venturing the opinion that for Judge Killits to hear the Quinlivan case "may not have a tendency to instill in us more confidence in the judiciary," and for the editorial in said issue, set up and printed in large, heavy-faced type, not customarily used for editorial articles, and placed across the top of two columns, on the editorial page of said issue, asking whether it would be "contempt to remark that it is a peculiar situation where the officer who makes the charge also considers the evidence, renders the verdict and imposes the sentence."

The court finds the respondents and each of them to be in contempt of the authority of this court, under the third count of the information and in the manner and form therein set forth, for the publication in the first edition of The Toledo News-Bee of September 14, 1914, on the first page thereof, set in type larger than usual reading matter type, across two columns, in the center of the page, entitled: "The News-Bee and Judge Killits," said publication being respecting the case then pending in this court wherein Harry J. Howard, managing editor of the said The Toledo News-Bee had been cited for contempt of court.

The court coming now to adjudge a penalty for the said misbehavior of respondents, respectfully, does find and adjudge that the respondent, The Toledo Newspaper Company, pay a fine of seven thousand five hundred dollars and the costs of this proceeding, taxed at $....., for which execution is awarded. Execution on this judgment is stayed until April 15, 1915. It is further ordered that the respondent, Negley D. Cochran pay a fine of two hundred dollars and that he be, and he hereby is, ordered to be committed to the jail of Lucas County, Ohio, until said fine be paid, but the excution of the order of commitment is stayed until April 15, 1915. To each of the several findings and orders aforesaid the said The Toledo Newspaper Company and the said Negley D. Cochran and each of them severally and separately excepts.

OPINION.

By Killits, Judge, January 23, 1915.

(Syllabus by the Court.)

1. Constitutional Law 90—Free Speech—Right to Punish.

The constitutional guaranty of free speech and a free press is not infringed by summary process and conviction in contempt, because of publications respecting a pending cause and tending to obstruct the administration of justice therein.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. 90.]

2. Contempt 9—Publication of Affecting Pending Cause—Exemption from Punishment—Statute.

The act of March 2, 1831 (Rev. St. § 725; Judicial Code, § 268 [Comp. St. 1913, § 1245]), declaratory of the law of contempt, was not intended to, nor does it, exempt publishers and editors from attachment for contempt for publications improperly affecting a pending case.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. 9.]

3. Contempt 6—Newspaper Publication—Pending case—Obstruction of Justice.

It is provided in section 268, Judicial Code, that this court may punish as contempt of its authority misbehavior so near its presence "as to obstruct the administration of justice." *Held*, that the criterion whether an alleged misbehavior is within this provision of the act is not the physical or topographical propinquity of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tending directly to affect the administration of justice.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. 6.]

4. Contempt 6—Newspaper Publication—Pending Case—Obstruction of Justice.

Publications in a newspaper of general circulation in the city wherein the court sits, which publications are of a nature to embarrass the judge of the court in his consideration of a pending cause, or which tend to appeal to prejudice against the court or against a party to the cause respecting a pending case, may be misbehavior so near the presence of the court as to obstruct the administration of justice, wherefore they may subject the publisher or the editor, or both, to summary process in contempt under section 268, Judicial Code.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. 6.]

5. Contempt 9—Newspaper Publication—Pending Case—Obstruction of Justice.

In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers. It is sufficient if, excluding any other reasonable interpretation of the language of the publication, after applying the ordinary rules for constructing the English language and considering how it may be reasonably understood by ordinary readers, the state of public feeling on the subject-matter of the publication, and any other relevant matter which may reasonably aid in understanding the necessary effect of such publication respecting the pending cause, it is seen to tend to obstruct the administration of justice therein.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. 9.]

6. Contempt 60—Newspaper Publication—Evidence—Other Publications.

In considering whether a publication is a contempt of court, in that it tends to obstruct the administration of justice in a pending case, the court may consider other publications on the same subject by the same publisher.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 183-187; Dec. Dig. 60.]

7. Contempt 9—Newspaper Publication—Defense.

It is no defense to a charge of contempt of court by publications respecting a pending case that the court was without jurisdiction to entertain such pending case.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. 9.]

The Toledo Newspaper Company and another were charged with criminal contempt. Judgment against defendants.

U. G. Denman, U. S. Atty., of Toledo, Ohio, and William L. Day, of Cleveland, Ohio, Special Counsel, for the government.

Lawrence Maxwell and Jay W. Curts, both of Cincinnati, Ohio, and Charles S. Northup, of Toledo, Ohio, for respondents.

KILLITS, District Judge. The respondents, the Toledo Newspaper Company and Negley D. Cochran, respectively the publisher and editor in chief of a daily newspaper published in the city of Toledo, Ohio, known as the "Toledo News-Bee," are before the court to answer to charges of contempt for publications in that paper between the dates of March 24 and September 17, 1914, inclusive.

The information is in three counts, and is filed by the district attorney by order of the court. The first count deals with publications between March 24 and September 12, 1914, affecting a cause pending in this court entitled Henry L. Doherty et al., Partners as Henry L. Doherty & Company, v. Toledo Railways & Light Co.

The second count offers publications of September 12 and 14, 1914, touching the proceedings in contempt in this court against one John Quinlivan; the rule to show cause against said Quinlivan in the contempt proceedings being entitled in the civil case whose title is given above.

The third count deals with a publication on September 17, 1914, relating to a proceeding in contempt in this court against Harry J. Howard, managing editor of the Toledo News-Bee.

The publications complained of, with the contexts of which they are a part, are set out in full in the information. They are so numerous and many of them so long that to reproduce them in a statement of fact, even by reasonable editing in condensation, would be to very greatly tax the situation. Besides, as not unusual in the style of journalism which the newspaper in question affects, they were so embellished with exaggerated headlines and other typographical display, operating as emphasis upon certain features, that their full effect cannot be exhibited in a practical attempt at reproduction in an opinion. For the present purpose, it is sufficient to set forth a superficial view of their scope, although that will of necessity be extended.

The information charges that the publications involved in the first count were calculated and intended to produce two effects: First, an influence on the court's consideration of the pending traction case, by attempting an impression that a decision contrary to the wishes of the paper would not only be very unpopular in the community but likely to be met with active opposition; and, secondly, an encouragement to popular resistance to any order the court might make following such unpopular decision.

These purposes are alleged to have been effected by violent attacks on the parties to the case who were interested against the city, attacks calculated to influence public sentiment; by comment on the personality of the judge of the court and on proceedings in the case under him, tending to the impression that the court was liable to influence against the city out of proportion to the law and facts; by encouraging, through intensive comment and extravagant headings and other typographical embellishments, a plan for popular uprising against the traction company in spite of any order the court might make in the case; by misrepresenting, especially through prom-

inent headlines, the action of the court through successive steps in the case; and by "featuring" attacks on the court from local organizations while the case was pending.

The proceedings concerning which publications are pleaded as offensive in the second and third counts were outgrowths of the traction case. It is alleged that these publications tended and were intended to embarrass the court in its consideration of the respective causes, by impugning the motives of the judge thereof and by attempting to belittle him in public estimation.

It is admitted that the paper in question containing these publications circulated to the extent of more than 50,000 copies daily in and about the city of Toledo, wherein sat the court in question and resided the judge thereof subject to comment in said publications. The order directing the district attorney to file the information and signed by the judge of the court recites the fact of his residence in the city of Toledo, and that, as a daily reader of the newspaper in question, the several publications had come to his personal attention.

Before entering into a more detailed description of the publications, it is proper to picture briefly the local situation and recent history of the city, as well as to outline the traction case referred to by title above, although the full force of the effect upon the paper's readers of the publication charged as offensive can be properly appreciated and gauged only by those who have seen the manner in which they were set forth and embellished from time to time with typographical exaggerations, and who, through residence in the city, are familiar with local conditions.

The testimony shows that Toledo has had a street railway franchise problem confronting it for more than ten years, and that agitation concerning it of the familiar extreme type had accompanied the attempt of every administration to deal with it, and that it had figured as the issue in five or six municipal electoral contests.

Franchises for some of the most important lines expired in 1910, and others, disintegrating the system, with March 27, 1914, although it was contended in the case, by both plaintiffs and the traction company, that they continued until October, 1915.

For years the News-Bee had violently opposed the local company which it had nicknamed the "Big Con." The paper's policy was three-fold—opposition to a franchise renewal, insistence on a straight three-cent fare, and for municipal ownership.

In the spring of 1913 a New York partnership, H. L. Doherty & Co., took over the management of the system and began negotiations in behalf of the company for a renewed franchise, meeting persistent and vigorous opposition from the News-Bee.

In the municipal election of 1913, all of the candidates promised three-cent fare, but those opposed by the News-Bee defeated those favored by it by a very large majority. The election amounted to a defeat for the incumbent administration, which, after the election, and within 40 days of its vacation of power to the incoming officiary, and four months before the franchises expired, passed an ordinance called the "Schreiber Ordinance," to require the company to operate its cars, after March 27, 1914, at the pleasure of the city, at the maximum fare of three cents with free transfers, and also to pay a rental of $250 per day for the use of the streets. Other terms were: An attempt to make mere continuance of operation after March 27th work a waiver of objections and an acceptance of the measure; and a direction to the city solicitor, in case of nonobservance by the company, to apply to an appropriate court for an alternative order of compliance or abandonment of the streets. No other provision was made for enforcement, nor did the ordinance specifically direct the company to cease its service even as an alternative to obeying the measure. The solicitor never applied for an order, as provided. The company very promptly signified that it would not follow the ordinance.

Monday evening, March 23, 1914, the city council defeated a motion to postpone the enforcement of the ordinance after the 27th for a reasonable time within which to determine the franchise question. The issue of the News-Bee of March 24 is the first pleaded in the information; the article in question occupying more than five columns under a heading extending across eight columns, the width of the paper, entitled: "Big Con Fights Three-Cent Fare in Federal Court." The article is preceded by a two-column wide condensation set up "boxed"—that is, with a rule line on all sides—entitled:

"Here's the street car tangle in tabloid; Thurstin (the city solicitor) promises to protect riders."

Preceding this a subhead in large type said:

"Thurstin Declares He Intends to Fight Until There's Nothing Left. Will Defend Any One Who Will Not Pay."

This statement is repeated in this form in one of the "tabloid" paragraphs in the "boxing":

"Solicitor Thurstin promises to protect those who are ejected from cars for refusing to pay more than three cents."

In the extended article, as a foundation for these headlines, is a two-line statement attributed to the solicitor that

any car rider put off for refusing to pay more than three cents after Friday night will be "protected." In the same connection, the mayor is made to say that he will do all possible to assist the solicitor, " 'even,' he said with a smile, 'if I have to call out the reserves.' "

The article deals mostly with the proceedings before the council the night before. According to it:

"An audience of 400 interested men, women and children pack council chamber and hiss those councilmen who urge postponement of three-cent ordinance."

One of the older councilmen is reported to have urged moderation because of the intensity of public feeling, fearing "bloodshed very likely and everything else that goes with it" on Saturday, if the company refused to obey the ordinance until a court passed on it, and his views are said to have provoked great disorder among the citizens present. The argument of another councilman for moderation was "met with jeers," and all through the debate "statements construed to lean toward the company were hooted." It was said that public interest in this meeting was so general that:

"The place was crowded to overflowing. No more could get in. Many had to stay out. * * * Men who had been in the franchise fight for a dozen years were there to see how these new councilmen would act in a crisis. * * * Men from almost every walk of life were there."

The account of the meeting proceeds to remind the readers of "one memorable night ten years ago," and the intervening years of wrangling over the street car question now about to culminate in a victory for the people through the new ordinance to go into effect within the week.

In January, 1914, Doherty & Co. began an action in this court against the street railway company in the nature of a creditors' bill, asking that the equity of redemption in the company be conserved to the payment of a large judgment, and for the appointment of a receiver. Other allegations of the complaint incorporated the so-called "Schreiber Ordinance," alleging that to attempt to meet its terms would be to destroy the equity of redemption in the company because they were confiscatory. It is averred that the officers of the city of Toledo are advising that this ordinance will be in force after March 27, and are suggesting to the public that thereafter citizens should refuse to pay any fare in excess of three cents and should demand the right to ride at such a rate, and that, on the refusal of the agents of the company to accept such fare, the rate should be insisted upon to the extent of violence.

It is alleged that the company holds other franchises besides those assumed to expire with March 27, whose provisions will be seriously impaired by the city's attempt to enforce the ordinance in question.

A feature of the prayer was that, if the situation did not change before March 27, the city of Toledo might be made a party to the case and the ordinance tested.

During the first three months of 1914, negotiations for a new franchise were in progress between Doherty & Co. as managers of the traction company and the city, and no proceedings were had in the case beyond the filing of papers until the forenoon of March 24, when, the action of the council the night before in refusing to extend the time from March 27 for the operation of the ordinance making action necessary from the standpoint of the company, supplemental pleadings were filed, setting up the developments to that time, and the motion to make the city a party, that an inquiry into the validity of the ordinance might be had, was pressed.

The judge of the court (Judge Killits) was then on duty in Cleveland, within the district. The proposed order to bring the city in and the application therefor were read to him over the telephone by the clerk and received the court's approval, with the direction that the order be sent to Cleveland for signature. It was so sent immediately, was signed on the 24th, and received back in Toledo on the morning mail of the 25th, and was entered as an order at chambers as of the 24th. Arrangement was made between the parties to meet the court at Cleveland at chambers at noon on Thursday, the 26th, to present the motion for a temporary injunction.

The article of the News-Bee of the 24th, which told of the proceedings in council on the previous evening, started with an account of the filing of the papers that morning in this court, its initial sentence, after the customary "tabloid" statement, being:

"With Henry L. Doherty directing operations, the Big Con got busy early on Tuesday in its efforts to evade the provisions of the Schreiber three-cent fare ordinance."

Early in the article it speaks of the interview over the telephone with the judge, and the account of the council meeting the night before follows at length after the statement ascribed to the city solicitor with reference to the case. For a cartoon the traction company was represented to be "In the Last Ditch," and managing editor Howard, testifying for respondents, said that the "last ditch" was intended to mean this court.

Owing to the illness of the judge on the 26th, the hearing was passed until Saturday morning, March 28, at Toledo, when it was then had, and, for reasons pertaining to the record as it then was, on the 30th the motions were overruled, but the main case was not otherwise affected.

In the meantime, however, the traction company had filed a cross-bill and had joined with the plaintiff in a demand for

a restraining order affecting the ordinance. This cross-bill repeats the charges that the city officials were publicly advising the people that individual citizens should take the enforcement of the ordinance into their own hands, and that any efforts by them individually in that behalf would be protected by the peace officers of the city.

The issue is also raised whether in fact the principal franchises to be affected by the Schreiber ordinance expired with the 27th of March; it being pleaded that they did not in fact expire until October, 1915.

March 25, being the day before that set for the hearing, the paper's front page contained a cartoon entitled "A Desperate Case," representing the "Big Con" as a very corpulent person in bed very ill, his attorneys and Mr. Doherty around him in great anxiety and very much caricatured; one of them explaining that, "We'd Better Call in Doc. Killits." The news article was headed, in big type extending across five columns, *"Car Riders May Ignore Order Barring Low Fare,"* and, continuing over two columns in which measure in the body was set, a subhead, "Plan Made to Test Schreiber Ordinance Immediately After Muny Ownership Meeting." Another subheading in the form of a "tabloid" paragraph was:

"Mass meeting of Municipal Ownership League at Memorial Hall, to be held Friday Night. Plan laid that Memorial crowd shall remain in session until midnight, then swarm on cars and refuse to pay more than three cents."

The article, set in type across two columns, in detailing this plan begins:

"It has been planned, *restraining order or no restraining order by the federal court,* to test the strength of the three-cent-fare-all-day ordinance immediately following the closing of the meeting of the Municipal Ownership League in Memorial Hall on Friday night, unless, before that time, other counsel prevails. The Schreiber ordinance will become effective at midnight on Friday, or 12:01 a. m. on Saturday. That's the night the Municipal Ownership League is to hold its first meeting. It is planned to hold the crowd until midnight. Then the crowd is expected to offer three-cent fares on all the lines radiating from Memorial Hall, and refuse to pay more."

Full details of the proposition follow, with the information that the project is in charge of one of the city's councilmen at large, who, when asked, "What if in the meantime the federal court issues a restraining order preventing the city from enforcing the ordinance?" said:

"There comes a time in the history of men and nations when things go too far, I, for one, am willing to obey any reasonable injunction, but I will obey no injunction that takes away from the people of this city their rights."

Following, was this:

"It is intimated that at the meeting of the Central Labor Union of Thursday night resolution will be approved calling on all labor union men to attend the mass meeting on Friday night. These men *may furnish the sinew to see to it that three-cent fares are accepted by the conductors* after the new ordinance becomes effective."

The editorial page of this issue contained, in type larger than that of ordinary reading matter, a two-column wide denunciation of the "Doherty outfit," who need "very badly in their business * * * a franchise that will make the millions of water in their bonds and stock as good as money in the bank." It is entitled, "Municipal Ownership the Only Way to Street Railway Peace," and the plaintiffs in the Doherty Csae are described as "arrogant franchise manipulators" who now begin "to smile sweetly at the people." They are said to complain that the company cannot operate for three cents because it "has to have a fare that will enable them to pay $800,000 a year interest on watered bonds and then pay dividends on stock that is all water—every penny of it"; and that they seek a franchise which "carries with it the right to levy a street railway tax on the people of Toledo—not all of the people of Toledo, but merely those who don't own automobiles and have to use the street cars." Having thus treated of the plaintiffs in the action, the writer thus introduces the court before which they are suitors:

"And now the railway crowd has taken the franchise into the United States court. That means, practically, that the rights of the people of Toledo will be placed in the hands of a two-legged human being who happens to be a federal judge.

"Just what kind of a judge this particular judge may be, and just what kind of a two-legged human being he is, we don't know. But the fact that he is a judge, and a federal judge at that. doesn't make him any more or less of a man than he was before he went on the bench.

"So the people's rights here will depend largely upon how his mind works, and whether he thinks in straight lines or around corners. Anyhow, whether he is a great big man or a little bit of a man, he will have a whole lot to say in finally determining the argument between the people of Toledo and the bond and stock gamblers and speculators."

The excuse for this editorial is to demand that the city employ, to assist the solicitor, attorneys "to impress the court" who equal in ability "the high priced legal talent that is for sale to the highest bidder" and employed by the "Big Con," and thus prevent, if possible, the latter from getting a "strangle hold" on the people in the courts.

In a written argument filed by counsel for respondents, this production is dismissed from consideration as "merely an intensely emphatic assertion" of the judge's human limitations.

Author-Respondent Cochran, disclaiming any intention to reflect on the judge's integrity, testified that he wrote it in language which the common people would understand, and in such a way as "to get the punch in" and to make the people take an interest in the case; that, although Judge Killits had held court in Toledo for nearly four years, he did not know whether or not he was a judge who would try cases exactly on the law, or be specially impressed by the professional standing of counsel for either party.

As part of the same editorial page appeared this:

"Holding court over the telephone is a new one, but, it seems to be a very satisfactory method of doing business."

March 26, being the day of the hearing, the paper carried a heading in type nearly an inch high and extending across the whole front page, *"Killits Upsets Low-Fare Order,"* repeating the heading on another page to which the subsequent article was carried. For subheads, it said:

"Holds Schreiber Ordinance Should be Suspended Until Hearing as to its Fairness. Instructs Marshal to have Deputies Ready to Enforce Ruling."

In the body of the article it is made very clear that the impression conveyed by these headline statements *is wholly false*, for it is said, what was a fact, *that there was no* hearing in Cleveland; that the judge—

"was ill in bed with a temperature of 102. He postponed the hearing until he could return to Toledo on Saturday. Judge Killits sent a five-page typewritten communication, through Clerk Wilson of the local United States court, for the information of the people of Toledo."

The statement was published in full and was nothing more than a setting out of the respective rights of the city and the traction company when a franchise expires, and an appeal to the judge's fellow citizens to maintain order until the court could hear the question, expressing confidence that, notwithstanding what had been predicted of the meeting for Friday night, the good sense of the city would preserve order. Not a word can be found in it which even hints any conclusion as to the merits or demerits of the issue presented by the motions. The only possible foundation for the assertion of the heading was contained in a separate statement on page 5 of the issue, in which this was said of the court:

"In a brief statement from the bench here today, Judge Killits said *no formal order had been issued in regard to the Toledo car situation, but that one might be issued on Friday night if the situation warranted.* The judge assumed the

bench only for a few moments. He said: 'As a citizen of Toledo, I ask that both the representatives of the city and of the company approach these problems in the proper way. It is plain to me that there is a chance to settle these questions with honor to both sides. No reasonable man wants to be other than fair to the company and the company must be fair to the city. No formal order has been issued, but if conditions warrant it tomorrow night one will be issued.' "

The same issue of the 26th contained this:

"Preparations are going on for an enormous mass meeting at Memorial Hall on Friday evening to deal with the street car situation. Leaders have been planning to hold the crowd until midnight and ask that they tender only a three-cent fare when they board the cars after that hour."

It is also reported that the Central Labor Union would advise labor union men to attend the meeting in force.

Besides, four editorials were published in this issue, one to the effect that "the people will have a sort of referendum vote as to whether they will pay three cents or five cents for a ride on the street cars"; another poking fun in a familiar way at persons prominently connected with the pending case, respecting the proposed meeting in Memorial Hall Friday night; another giving assurance that the police will not "use their clubs on car riders who refuse to pay more than three cents car fare after Friday," because Sam Jones, some time mayor of Toledo, once said that *"the law is only what the people will back up."* The last was under the heading, "In the Balance," and was:

"The case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators will now be placed in the balance by a judge of the United States court. Let substantial and not technical justice be done."

On Friday, March 27, the day before the ordinance was to be effective, it was announced that all parties urged that no violence be indulged that evening, but that the meeting for Memorial Hall that night would be held. The fact that the court hearing would not be until Saturday forenoon was announced. By way of cartoon, a double one was offered, labeled, "As we lose Kapp we get Lapp." One panel represented the marshal of this court (Lapp) proceeding in great haste towards Toledo, bearing a hand bag marked "Order from Judge Killits," although in fact there was no order; while the other depicted the public safety director of the city (Kapp), who was the head of the city's police department, in equal haste on his way to Philadelphia. Editorially, under the caption, "The Big Con's Attitude the Same Old Defiance of the People," set in large type, in double-column space, it was said, among other things:

"It is now a trespasser on many streets of Toledo, and will be on practically all of them by tomorrow morning. It has now rushed into the federal court to try to take from the hands of the people of Toledo the right to control their own streets, and to make terms under which the Big Con may use those streets."

That there was a lively possibility of much disorder on the expiration of the franchises there can be no question. The News-Bee's news article of the 27th spoke of "the anxiety about trouble Friday night" as part of the situation; and "featured," with large headlines, that a sentiment that the city should not be disgraced by disorder was arising causing much protest against tendencies in that direction already noted in its columns. The fact that cots were being placed in the federal building to facilitate night service of United States marshals, if necessary, was the text of another article, with the announcement that officers in addition to these stationed in Toledo were to arrive from Cleveland to assist in preserving order. The paper had the enterprise to print the portraits of two of the local deputies in this connection. To avoid a chance for disorder the street car company notified conductors to carry persons free after Friday night who refused to pay more than three cents. In two days the free riders numbered more than 62,000.

Saturday's issue (March 28) published a news article in five columns on the situation, under a main headline across five columns: "Thousands Riding Free; Killits Hears Big Con Plea"—in which the order of the company is printed that persons be carried free rather than that conductors have any controversy over the tender of three-cent fare pending the court proceedings, and it was stated that the court was hearing the motions against the ordinance. For a cartoon in connection with the news article and relating to the attempt of the mayor to insist on a three-cent ride during the night, that officer is represented as saying "I'll pay no more than three cents," with Mr. Doherty advising the conductor that the mayor should be regarded as his guest. The title of the cartoon was: "Doherty—The Man Who Put Con in Conductor."

Monday evening the motions for a temporary injunction restraining the enforcement of the ordinance were denied, because the measure itself provided that it should be enforced through an order out of the state court for which the city solicitor was directed to and, it appeared, was about to apply. It was obvious that the reason advanced in this court for a temporary injunction, namely, that the ordinance was unreasonable, was available to the company to resist the solicitor's application for an order out of the state court to enforce it,

and that, until the state court had found it enforceable because reasonable, the company could stand its ground against it and in such attitude was entitled to protection. The ordinance was neither self-enforceable nor operative without order of some court.

Although the court had specifically held that the city could summarily stop the use of the streets for traction purposes by the company, the same issue (March 31) of respondents' paper which carried the decision bore this editorial utterance:

"To the layman it appears *peculiar that the city cannot stop the company's cars* because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights, regardless of the needs of the people. Reminds us, somehow, of the elder Vanderbilt."

By answer respondents say that, if this may be construed as a misrepresentation of the court, "the error was unintentional."

Early in August, the main case being still on the docket of the court, the plaintiffs and the defendant traction company filed supplemental pleadings setting up the failure of the city solicitor to proceed, as it was asserted he had agreed to do, to seek an order for the enforcement of the ordinance according to its provisions; that because of threatened disorder the company was carrying passengers free who insisted upon three-cent rides; that its losses in this behalf aggregated a thousand dollars a day; that its protests to the city were met with specific orders to the police of the city to require the company to carry passengers for three cents, with a policeman on each car for that purpose, if necessary; and that the city was threatening to compel the company to maintain a street car service under the ordinance and to restrain, by the use of the police force of the city, the removal of its cars from the streets.

Motions were renewed under these circumstances, supporting by affidavits the prayer of the pleadings in the case that an injunction be granted restraining the city from compelling the company to maintain service in the city under the Schreiber ordinance and from preventing the company from removing its cars from the streets and discontinuing its service. An affidavit filed before the hearing of these motions, and never denied, set forth the fact that to the date of the hearing the company had been compelled to carry free under these circumstances 8,000,000 passengers.

August 14, hearing on these motions was taken up. Testimony was then produced tending to show that the ordinance was confiscatory; that the company in fact, with the routing

of lines then obtaining, could not carry passengers for three cents and pay bare operating expenses. On this showing, the city was directed to support the ordinance by testimony, and, at the city's request, the hearing was passed to September 8, that the city might be prepared. This was plainly, as shown by the record and the court's statement, the familiar situation of the sustention of the burden of proof by the side having the affirmative and the requirement upon the negative (here the city) to then produce its defense, yet the News-Bee treated it, in an article headed: "Test of Schreiber Ordinance in U. S. Court Sept. 8. Killits Puts Burden on the City"—as though the court were requiring the city to prove primarily its legislation to be valid. The impression so occasioned seems to have been the inspiration later of an inflammatory attack on the court by a local organization, out of which grew the attachment for contempt of John Quinlivan.

From August 14 to September 5 the court was allowed to escape the paper's attention. On the last-named date, this editorial paragraph appeared.

"If Judge Killits should be held in Canada while Henry L. Doherty is marooned in Wall street, what would we ever do? Still Peter Parker is always willing to give us good advice."

The Peter Parker referred to is admitted to be a citizen who had once been subject to much criticism, whereupon he left the city. Returning some time afterward, he had been a frequent writer of letters to the News-Bee on public questions

September 6, the Socialist "local" of Toledo adopted resolutions relative to the pending case. On the 9th, while the court was hearing the case, the News-Bee published a portion of the resolutions in the following article:

"Socialists Call Big Con Trespasser.

"Toledo local of the Socialist party has adopted a resolution which refers to the street railway company as a trespasser in the streets, and claims no judge has legal authority to compel a city to insure a corporation profit. The resolution concludes:

"'We contend that the present Schreiber ordinance is prior to, and above any judge or court made law. And we contend that no judge, federal or otherwise, has the right to unmake laws made by a duly elected legislative body. We contend further that the people of Toledo have by their votes sustained the Schreiber ordinance.'"

September 8 and 9, the motions were finally heard. On the last day the city, through the solicitor, admitted that the ordinance was unreasonable and impossible to be followed by

the company without loss. The court then took the issues under advisement, stating distinctly that no decision would be handed down for two or three days, when we should have considered the objections to jurisdiction advanced by the city. It was also stated that, if the court should decide to restrain the operation of the ordinance, the enforcement of the order of injunction would be suspended for a short time to allow public feeling to cool.

Although it was plain that yet the court had taken no final action, that it was still considering its jurisdiction to act at all, the issue of the News-Bee of the 10th, containing an account of court proceedings on the 9th, was headed with the false statement in large type on the front page: "Low Fares Banned by U. S. Judge." The evening of this issue, at the regular meeting of the Central Labor Union, made up of accredited delegates from the numerous labor organizations of the city, a resolution was read by John Quinlivan, business agent of the union, denouncing the court for placing "the burden of proof of the Schreiber ordinance on the city," and recommending that preliminary steps be taken by the union for the judge's impeachment should he render a decision in the case adverse to the city. The issue of the News-Bee, September 11, contained an account of this meeting and the discussion of the proposed impeachment, under the heading: "Judge Killits is Criticized in Central Labor Union Meeting."

An attachment was issued September 11 for John Quinlivan; whereupon, in the first edition of the News-Bee of Saturday, the 12th, on the streets before the court's decision in the pending case, in the guise of printing the news of the proceeding against the labor organizer, the offensive and threatening language attributed to him was extracted from the body of the article and placed in different and more prominent setting, embellished with a rule border known as "boxing," as a distinctive feature of the front page, after this fashion:

"Killits Accuses John Quinlivan of Contempt.

"Basis of Charges Against Union Leader.

"These are the remarks alleged to have been made by John Quinlivan, and on which Judge Killits bases his contempt charges:

"'The street car situation of Toledo is in the hands of a friend of the Rail-Light.

"'Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.

"'Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolutions and let our federal friend know what we think of him.

"'The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.

"'Impeach Killits.'"

These publications conclude the foundation for the first count.

Under the second count, the information sets up that in issue of September 12, under the heading, "Quinlivan is Ready to Defend Killits Contempt Charges," the paper published an account of Quinlivan's attachment, in which it is said that "Judge Killits stated on Saturday that he would hear the case himself"; and that, on the 14th, again in a news article dealing with the same case, the statement was repeated in this form, "Killits has announced that he will hear the case;" and that, on another page of the issue of September 14, a communication, under the head, "In the Editor's Mail," was published, reading:

"The Quinlivan Case.

"To the Editor:

"Regardless of whether Judge Killits has or has not the right to sit in judgment in the Quinlivan case, it seems to me that the ethics of the affair would lead him to either appoint some other judge to hear the evidence, or better still, have some other authority make the selection. It stands to reason that such tactics on the part of the judiciary will not have a tendency to instill in us more confidence.

[Signed] Paul G. Dennie."

It was testified by Managing Editor Howard that this letter was written in his office by Dennie and edited and revised by him (Howard). And in the same issue, casting its utterances in prominent black-face type set across two columns, at the head of the editorial page, the paper said.

"Would it be contempt to remark that it is a peculiar situation where the officer who makes the charge, also considers the evidence, renders the verdict and imposes the sentence."

As the offering under the third count, it appears that a rule in contempt was issued out of this court for Harry J. Howard, managing editor of the News-Bee, directing him to show cause why he should not be punished for contempt for certain publications, including those set up in the second count and dealing with Quinlivan's case, and that said proceeding against Howard was pending when, with relation thereto, respondents published, as a feature of the first page of the paper for September 17, in larger type than that used ordinarily for reading matter, and across two columns this, with reference to the charge against Howard:

"The News-Bee and Judge Killits.

"As we see it the public interest in the contempt proceedings instituted by Judge J. M. Killits against the News-Bee and Managing Editor Howard, depends not so much on what the judge sees fit to do or not do, as it does upon how his action may affect the policy of the News-Bee.

"It has been the policy of this paper in the past to discuss frankly and fearlessly all questions of public policy and interest. And without regard to whether our statement of the truth, as we see it, pleases or displeases this, that or the other citizen—even though that citizen happens to be what is commonly known as a judge.

"We have no desire to influence the conduct of any judge in interpreting the law in any particular case. And we have no intention of permitting any judge of any court to influence our judgment in defending the public interest.

"We don't want to censor judicial decisions, and will not permit judicial censorship of the News-Bee's editorial policy.

"We have notions of our own about contempt of court. One of them is that nobody but the judge himself can inspire public contempt of the court over which he happens to preside.

"The people of this country, because of patriotic education from early youth, start out with respect for our federal courts. When that respect changes to contempt, it can be only because of the conduct of a judge or judges.

"We have said before that after all, Judge Killits is no more than a two-legged man like any of the rest of us. We repeat it for the sake of emphasis. No judge judges by divine right even though he holds his job for life.

"No judge is infallible or omnipotent. No physical or mental change takes place when he is lifted from the practice of law and placed upon the bench, that transforms him from a human being into a god.

"And what kind of a judge he turns out to be depends almost altogether on the kind of a man he was beforehand.

"We shall not discuss now the merits of this particular case. We do not discuss cases while they are pending, with any purpose of interfering with the administration of justice.

"We prefer to give every judge free rein to make either a Solomon or monkey of himself, if either be possible.

"But once the case is decided, we shall say and publish whatever we think best for the public good, whether it pleases or displeases any judge—even if that judge happens to be John M. Killits."

The News-Bee is published daily in several editions. On the 17th of September the foregoing article appeared in the so-

called noon edition. About 1 o'clock of the 17th an order to show cause in contempt was filed against the Toledo Newspaper Company, Cochran and Howard, based on the several publications, including the foregoing, appearing in the early edition of that day. Mr. Cochran testified that he was aware of the filing of this order and its scope as soon as it was filed, being at the courthouse at the time. Four subsequent editions of the News-Bee were published on the 17th, including its regular or home edition, each bearing the above editorial across two columns in the center of the front page, while in an adjoining column was, in each edition after the noon edition, an account of the fact that respondents were directed to show cause why they should not be punished for contempt for publishing, among other things, the identical writing. This order was superseded by the present information.

[1-4] The inquiry is direct, of course, whether the offenses charged to respondents are within the scope of section 268, Judicial Code (section 725, R. S.; Act of March 2, 1831), which reads, so far as it applies here at all, as follows:

"The said courts shall have power * * * to punish * * * contempts of their authority: Provided, that such power * * * shall not be construed to extend to any cases except the misbehavior of any person in their presence, *or so near thereto as to obstruct the administration of justice,*" etc.

The language respecting the proviso has been slightly changed from the original act, but it is plain that the revision has not made necessary a different construction. It is settled that the statute is a limitation, through definition, upon the powers of inferior federal courts to punish contempts by summary process. Ex parte Robinson, 19 Wall. 505, 510, 22 L. Ed. 205, and cases citing it.

It is contended by respondents, upon authorities soon to be considered, that the statute was intended by Congress to, and does in fact, completely exempt newspapers from responsibility in contempt under all circumstances. This claim, and its support, are deemed worthy of fullest consideration.

But one federal case is known to us to be reported and decided prior to the act of 1831, but under the act of 1789, directly dealing with an alleged newspaper contempt; the act of 1789 providing power in the courts "to punish by fine or imprisonment at the discretion of such courts all contempts of authority in any cause or hearing before the same." We refer to the case of Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6,616, in which the court, two judges sitting, held that:

"Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the coun-

sel, etc., with reference to the suit or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment."

Decisions to the same effect in state jurisdictions were not rare, and that this was a proposition undebatable at common law we believe will not be disputed, whatever may have been the uncertainty of the common law respecting mere libels on judges or attacks on the courts not connected with pending causes; and the act of 1879 undoubtedly was designed to clothe federal courts with common-law powers in this respect, although the Supreme Court, in United States v. Hudson et al., 7 Cranch, 32, 3 L. Ed. 259, said:

"To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute;"

—thus seeming to suggest that statutory authority was not necessary. Many subsequent decisions of the Supreme Court approving the Hudson Case, although holding that the act of 1831 acted as a limitation upon the exercise of the power, so decidedly affirm its inherency in a court of general jurisdiction as essential to the tribunal's very existence as to render it very doubtful if that court would support an act taking away the power altogether from one of this jurisdiction. Ex parte Robinson, supra; Ex parte Terry, 128 U. S. 289, 302, 9 Sup. Ct. 77, 32 L. Ed. 405; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 489; 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49; Ex parte Savin, 131 U. S. 267, 275, 9 Sup. Ct. 699, 33 L. Ed. 150; Eilenbecker vs. District Court, 134 U. S. 31, 36, 10 Sup. Ct. 424, 33 L. Ed. 801; In re Debs, 158 U. S. 564, 594, 15 Sup. Ct. 900, 39 L. Ed. 1092; Bessette v. Conkey, 194 U. S. 324, 327, 24 Sup. Ct. 665, 48 L. Ed. 997.

The case at bar demands a construction of just so much of the statute quoted. If respondents are responsible, it is because we must conclude that, upon the whole case, the acts charged against them have the quality of misbehavior so near the presence of the court "as to obstruct the administration of justice."

At the outset we are relieved of the consideration of the constitutional guaranties of a free press, by the decision in Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup Ct. 556, 558 (51 L. Ed. 879, 10 Ann. Cas. 689), in which the court, speaking in a case of newspaper contempt, said of the guaranties in the first and fourteenth amendments:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous* restraints upon publications as had been practiced by other governments,' and they do not prevent the *subsequent* punishment of such as may be deemed contrary to the public welfare."

The court holds that the rule which made criminal libel punishable despite the guaranty of a free press "applies yet more clearly to contempts." No case has been more generally cited with approval on this subject than Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155 (1788), a case of interference by publication with judicial proceedings in a pending cause, in which, considering the constitutional guaranty, the court said that "it is impossible that any good government should afford protection and immunity" to those who abuse the privilege of a free press. The current of authority since to the same effect is unbroken.

The main proposition asserted by respondents, if valid, produces a startling absurd result. According to it, they are immune from responsibility for an attack upon an Ohio Federal Court under the construction, for which they insist, of section 268, Judicial Code, which conduct, if perpetrated upon an Ohio state court under precisely similar circumstances, would involve them in attachment for contempt under a state act of almost precisely the same tenor as that of the federal act, and passed by the Ohio Legislature in imitation of the latter (Ohio Act of 1834; section 5639 R. S., section 12136, General Code of Ohio). The decision of Myers v. State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638, to be discussed later, settles responsibility of newspaper editors and publishers under such circumstances in Ohio procedure and, following Patterson v. Colorado, supra, which cites Myers v. State with approval, a conviction in the state court under the Ohio statute would be upheld by the Supreme Court of the United States.

It cannot be that statutes of substantially the same scope and language in two jurisdictions of the same geographical application should so vary in meaning and intent that one should have virility, with respect to a powerful public influence, to vindicate the highest public interest, while the other, in an application to the same kind of circumstances, should be impotent to sustain in any degree the same function.

Chancellor Kent, on an occasion hereinafter referred to, said that such a construction of the act offered by respondents was unreasonable. Nevertheless it is supported by direct authority. In re Poulson, Fed. Cas. No. 11,350, a Circuit Court case in 1835, in Pennsylvania, the judge sitting therein entertaining the same view of the law in United States v. Holmes,

Fed. Cas. No. 15,383. In some measure, also, it is the view of the court in Re May (D. C.) 1 Fed. 737, 743; Morse v. Montana Ore Co. (C. C.) 105 Fed. 337; and Cuyler v. A. & N. C. R. (In re Daniels) 131 Fed., 95, a decision by the District Court in the Eastern District of North Carolina.

We are confident that it may be made entirely clear, if we may be allowed time and space necessary, to show that this claim for the act's purpose is untenable; that Congress never intended to, and did not, immunize newspapers from responsibility in contempt for interference by improper comment on pending cases; and that a myth in this respect has grown up, having its origin wholly in the views of the court in the Poulson Case, supra, Baldwin, Justice, that being the first reported decision after the act of 1831. In understanding Justice Baldwin's views, it may be well to consider that he was a Pennsylvanian, from a state whose Legislature in 1809 had passed an act declaring that no newspaper comment, however invidious, concerning a pending case, should be construed into a contempt punishable by summary process. He says, in fact, in his opinion, without the slightest record to justify the assumption, that he believes Congress to have been influenced in the passage of the act of 1831 by the Pennsylvania statute. He laments:

"The court is disarmed in relation to the press; it can neither protect itself, or its suitors, libels may be published * * * without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most willful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity. * * *

"The press is free, if not set to work in the presence of the court, or so near as to interrupt its business. The law does not prohibit any endeavor made to influence or intimidate a juror or witness, if corruption, force, or threats are avoided. Papers may be put into their pockets, conversation held with them, newspapers put into their hands, or statements made in relation to any matter in issue while they are actually impaneled. The court may regret and censure the practice, and perhaps admonish the party who thus tampers with a juror or witness, but can neither punish the offense nor prevent its repetition. The law has tied their hands. The judges must be passive. It is not for them to be the first to set the example of disobedience to the law, or attempt to evade plain enactments. * * *

"For the protection of parties, for their security of a fair and impartial trial and decision of their case on the evidence and law which apply to it, to defend them against the efforts

of the press or of individuals to excite a prejudice in the minds of a jury, to induce them to find a verdict on out of door statements, or other means of perverting their judgments—no legal check is interposed."

There is much more of the same language in the Poulson Case, which finds its echo in a subsequent opinion of the same judge, being the second decision under this statute—United States v. Holmes, supra.

If this were the law, then indeed would an inferior court of the United States be largely shorn of "one of the attributes, one of the powers necessarily incident to a court of justice"—the power "of vindicating its dignity, of enforcing its orders, of protecting itself from insult." Eilenbecker v. District Court, 134 U. S. 31. 36, 10 Sup. Ct. 424, 33 L. Ed. 801.

That this court is not so impotent we are prepared to insist, notwithstanding the authorities cited, all of which clearly are influenced by these views of Justice Baldwin, which, on the record we shall hereafter produce, are surely erroneous. We digress however, to note that one of the two reasons given by Justice Baldwin in confirmation of his faith has disappeared with the decision in Savin, Petitioner, 131 U. S. 267, 9 Sup Ct. 699, 33 L. Ed. 150. The second section of the act of 1831, now section 5399, Rev. Stat., made it a crime to "corruptly or by threat, or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice," etc. Justice Baldwin said:

"This provision is in further confirmation of the view taken of the first section. It is a clear indication of the meaning of the law, that the misbehavior which may still be punished in a summary manner does not refer to those acts which subject a party to an indictment. To construe it otherwise would be to authorize accumulative punishment for the same offense. * * * The first (section) 'alludes to that kind of misbehavior which is calculated to disturb the order of the court.' * * * 'The obstruction of the administration of justice,' in the first section, refers to that kind of behavior which actually disturbs the court in the exercise of its function while sitting"—while, he proceeds to say, all other invidious acts, if reached at all, are under the second, or criminal, section.

But the Supreme Court, in the Savin Case, held that the federal courts, under this act, may punish summarily as contempt, under the first section, misbehavior which is also punishable by indictment under the second section of section 5399, R. S.

In the May case, supra, the point decided was that a juror was in contempt for misbehavior near to the pres-

ence of the court when he visited a codefendant, under an indictment in which separate trials were had, at the latter's home, and there talked on the merits of the case on trial. The court said (1 Fed., 737, 742):

"The act does not define how near the court the misbehavior must be, nor the character of such misbehavior, and I think it may fairly be construed to extend to any misbehavior by a juror, in his capacity as such, wherever committed, since such misbehavior necessarily tends to obstruct the administration of justice."

There was clearly no occasion for the court to say (page 743 of 1 Fed.):

"The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

In the Morse case, supra, the decision was that a party aggrieved by improper newspaper comment pending his case was not precluded from urging its prejudicial influence on the verdict as a ground for new trial by a failure to ask for an attachment in contempt. As a nonessential part of the opinion's argument, the court expressed a doubt whether contempt would lie in the circumstances then before it.

The views, therefore, of Judges Brown and Knowles, respecting this matter are pure dicta. The Daniels case (C. C.), 131 Fed., 95, upon which respondents so strongly rely, will be considered later.

We would not venture to disagree with the construction of a statute by a justice of the Supreme Court, although sitting as a nisi prius judge, extended in an opinion so nearly contemporaneous with the passage of the act, unless fortified with very considerable support. Justice Baldwin's views are, as we shall see, plainly the control of whatever subsequent authority respondents are able to offer. They are so confident, comprehensive, and positive as to seem to have been utered ex cathedra. However, he bases them upon contemporary history, the record of which is as available to us for examination as in his time. This is not a situation where there has been a continuous and consistent construction for a long period; for, when we consider the authorities offered by respondents, all controlled by the Poulson case, we find that all but one of them are pure dicta, and the other nearly if not quite so (In re Daniels, discussed infra); and when the principal reason relied on by Justice Baldwin for his holding, namely, that the criterion of "nearness" to the court's presence which resolves a misbehavior into a contempt is

a physical or topographical propinquity to a sitting court, is considered, we find him supported only by what is seen to be but a dictum of Justice Field, in Re Robinson, supra, to be later considered, while it is controverted by very important series of decisions by *all the federal courts* down to the present time.

The Poulson case is respectable because of the time of its decision and the eminent quality of the judicial mind which considered it. As to the first, if we may judge of the paucity of reported cases, the federal judiciary has not suffered many attacks of the character before this court, which might call its soundness into question. Of the second element of importance, it may be said that the infallibility of an inferior court decision is to be tested by the premises and the soundness of its reasoning.

Again, this decision does not gain strength because it is of a statute couched in ambiguous language (Houghton v. Payne, 194 U. S., 88, 99, 24 Sup. Ct., 590, 48 L. Ed., 888); for no ordinary construction of section 268, or of the original act, produces a hint that any category of behavior involving obstruction of justice is immune It can not be claimed, of course, that any right acquired by virtue of the construction in the Poulson case will be divested if it is disregarded. Where no rights intervene, especially when the language is unambiguous, a question of construction of a federal statute is not judicially settled until the Supreme Court has spoken. Wilson v. City Bank, 17 Wall., 473, 21 L. E., 723; Andrews v. Hovey, 124 U. S., 694, 716, 8 Sup. Ct. 676, 31 L. Ed., 557.

The opportunity to go into the legislative history of an act whose scope is a subject of controversy is clear. We do not ignore that, generally, the statements of views of members of Congress, in debate, are not proper sources of the meaning of a statute (United States v. Freight Association, 166 U. S., 290, 318, 17 Sup. Ct., 540, 41 L. Ed. 1007); but the character of the debate, whether sentiment was divided or unanimous, the environment of a bill, its legislative vicissitudes, and pertinent contemporary history, may be considered (Johnson vs. Southern Pacific Co., 196 U. S. 1, 20, 25 Sup. Ct. 158, 49 L. Ed. 363; Lincoln v. United States, 202 U. S. 484, 498, 26 Sup. Ct. 728, 50 L. Ed. 1117; Standard Oil Co v. United States, 221 U. S. 1, 50, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734). In Johnson's case the court went to the Congressional Record to ascertain "the mind of Congress" to assist it in construing the automatic-coupler act, and, in the Lincoln case, the divi-

sion of sentiment over the act of July 1, 1902, attempting to ratify executive dealing with the Philippines, was considered in interpreting that statute.

Especially might this court go to the legislative history of the act when it is asked to follow a construction violating, as that of Justice Baldwin seems to, several accepted canons of interpretation. A statute under construction should be harmonized with prior acts and decisions, if reasonably possible. Blair v. Chicago, 201 U. S. 400, 459, 469, 26 Sup. Ct. 427, 50 L. Ed. 801; Lincoln v. United States, supra. The interpretation should be reasonable, and should be that which comports with the public welfare or public policy, as the Supreme Court applied the rule to railroads in construing the Sherman Act. United States v. Freight Association, supra, 166 U. S. at pages 320 et seq., 17 Sup. Ct. 540, 41 L. Ed. 1007.

In Harris vs. Runnels, 12 How. 79, 86 (13 L. Ed. 901), the court said:

"It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, * * * such an interpretation must be rejected."

Justice Baldwin would read into the statute an exception from its operation which is against public policy, and, in doing so, antagonizes the principle that a purpose in derogation of the common law must be, at least, visible.

In Maxwell v. Dow, 176 U. S. 581, 602, 20 Sup. Ct. 448, 456 (44 L. Ed. 597), the Supreme Court said that it is less material, in case of a constitutional amendment, to consult the legislative history of a measure, than when an ordinary bill or resolution is to be interpreted, but, even then:

"The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."

Wherefore, we submit, we may refer to the impeachment of Judge Peck, closing with his acquittal January 31, 1831, as the inspiration of the act in question. The act's genesis in that trial is historically conceded, and it is clearly discernible from the records of both the trial

and the act's passage that, not only is an interpretation to wholly exempt newspapers from the measure's operation not sustained in any degree by utterances on the floor of either house of Congress, but is inconsistent with the whole current of debate. The charge against Judge Peck was based on the fact that, having in December, 1825, handed down orally an opinion *determining finally* a case then before him and reducing his judgment to a decree specifying the precise points upon which the court reached its determination, three months thereafter he published a written opinion, in which he confessedly traveled, not only outside of his oral delivery, but beyond the record of the concluded case, and that, because counsel in the case in print criticized the reasoning of the judge in this published opinion upon matters, as the judge himself confessed, not before him in the original hearing, he attached the latter as in contempt of course, and imprisoned him, and disbarred him from practice for 18 months. For the facts now presented, an examination has been had of the Congressional Globe for the 21st Congress, of the journals of both Houses, of Gales and Seaton's Register of Debates, and of Benton's Abridgement.

The day after the House received the report of the failure of the impeachment (February 1, 1831), Mr. Draper, of Virginia, submitted the following resolution, which was agreed to without a division:

"Resolved, that the committee on the judiciary be directed to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States."

What Mr. Draper had to say in explaining the purpose of this resolution is all the reported discussion had in either House on the subject after the Peck trial; wherefore we quote briefly: Saying that it was not his intention to discuss a question which had recently been much agitated elsewhere, he continued:

"I wish to know whether if I myself choose to go into the public newspapers to defend any vote I give here it be not competent for any man who thinks proper to do so to enter the same forum upon equal ground to show that my opinion is wrong."

And, following with an argument that it would not be contempt of the House if it were sought to criticize him under such circumstances, and that no other department of government should have protection denied to the legislative, he proceeded:

"Whenever an individual in office *lays aside his official capacity*, and endeavors by argument and reason to convince others that anything which he has done officially had been done properly, he has a right to be met by whomsoever, differing in opinion from him in any forum which he himself may select. * * * It may be said, sir, in opposition to the object of this resolution, that there will be difficulty in defining contempts of court. Though this may be true, we shall find no difficulty in defining what are not contempts. We can embrace, in any legal provision on this subject many cases which are not contempts. We might say, for example, *that it would not be a contempt of court to express an opinion upon any decision finally made in court*, etc. We might declare that it should *not be a contempt of court in any one to say that a judge is not immaculate*. But the law ought to be so clear that every individual may be able to look to the statute book, and know wnether in any thing that he may do, he acts within the law or not." (The italics are ours.)

The proceedings of record thereafter were as follows: February 10, a bill (No. 620) "declaratory of the law concerning contempts of court," was orally reported from the judiciary committee by Mr. Buchanan, and, read twice, referred to committee of the whole House; February 28 read third time, and passed without debate, division, or roll call; March 1st passage of bill by the House referred to the Senate, and referred to the Committee on Judiciary; March 2 orally reported for passage with amendment by Mr. Webster, considered, read three times, and passed, without debate, division, or roll call; March 2, House concurred in Senate amendment, with an additional amendment, in which the Senate concurred, and the bill was passed. Nowhere is there recorded a statement of the nature of amendments, nor hint that anything more than formal attention was given to a subject which had been thoroughly discussed in the Peck case. The Globe does not contain a line on the subject after the introduction of Draper's resolution.

Going now, as we may (The Delaware, 161 U. S. 459, 472, 16 Sup. Ct. 516, 40 L. Ed. 771), to the debate in Peck's Case, if further light on the attitude of Congress out of which the act grew is demanded, we find that, when the resolution for impeachment was up for initial consideration in the House, Ellsworth, for the committee, directed attention to the fact that Judge Peck had "neither jurisdiction nor provocation; *he had finished the case, adjourned the court, and descended from his judicial station* to that of an essayist of a

newspaper." "Shall it be declared," said he, "to the American people that, *after a judge has given his opinion and dismissed the case,* he may arrest a citizen, drag him before his tribunal," and prosecute him for contempt?

When the matter was on for adoption of the report, Buchanan, making the principal argument, went into great detail to explain that the case was entirely concluded when the alleged contempt was perpetrated. He urged that, notwithstanding that the language of Blackstone and Lord Hardwicke "is sufficiently general to embrace other cases," the authorities either from England or America did not include any case in which the courts had attempted to summarily punish libels upon their proceedings *"except in causes actually depending."* Continuing, he said:

"I shall not affirm that no case exists in which the courts of the United States ought to possess the power of punishing summarily for constructive contempts. If, *whilst a cause is depending,* particularly a case to be determined by a jury, *an inflammatory publication should be made in the newspaper, touching the question to be decided, calculated to enlist public feeling in favor of the one party or prejudice it against the other,* the court may possibly, under such circumstances, inflict justice upon the author." (Italics here and elsewhere in this opinion, ours.)

In this connection he called attention to the law (passed in 1809) of Pennsylvania denying even this power to the state courts. A year later, closing the prosecution, he expressed a personal view that courts ought not have the right to punish summarily even libels respecting pending cases, however not urging the proposition as applicable against Judge Peck, but emphasizing again the fact that in the case before the Senate judicial functions had entirely ceased before Judge Peck attempted anything under criticism.

Other prosecutors whose addresses are preserved were McDuffie and Storrs. McDuffie, with great particularity, urged that the case had been concluded, that *"there was an end to the judicial functions of the judge as to that case,"* when he attempted to resent a published criticism of an "extrajudicial opinion." He asserted that no man of any sense would contend "that the judges of the United States had any power, any right to punish any libel, however flagitious, on any act of the court, *after it had been done,* as a contempt."

Storrs maintained the position:

"That no free citizen could be punished by the summary process of attachment for *a libel or contempt against any court in a cause not pending* in that court, * * * and that the conduct

of Judge Peck tended to break down all the securities and guards which the law had raised for the protection of the liberties of the American people."

There is no *intimation in any discussion* of intent to exempt newspapers from summary process in contempt *under all circumstances.*

It is worthy of note that two men of great influence, occupying opposite sides in the Peck controversy, handled this measure on its passage. Mr. Buchanan was chairman of the House judiciary committee. It would seem that, if he were asking Congress to follow Pennsylvania's example in completely immunizing the press, he would have produced a measure with little or no ambiguity in that respect. The record shows Daniel Webster to have been actively interested in Peck's trial. He voted with the majority of the Senate for acquittal. It sems very clear that, as chairman of the Senate committee in charge of the bill, he would not have recommended a measure to be interpreted as going away beyond the position of Peck's prosecutors, nor would others of the majority have allowed it to pass unchallenged.

Men notable in our history, in both houses, and who were from states whose courts then held, and still have, full common-law powers respecting contempts, interested themselves by vote and speech in favor of Judge Peck. It is unreasonable to claim that they would have been even silent, if this act was intended to put the press out of reach of its provisions, much less to have abetted such a proposition.

We must not forget that Congress, in entitling the measure "An act declaratory of the law concerning contempts," recognized a law already existing. The act does not confer new powers, nor does it limit powers theretofore actually enjoyed by the federal judiciary. It does not repeal the act of 1789. We loosely say that it limits the power, but the limitation inheres only in the definition which it provides. In declaring what the law is Congress is but saying what it theretofore had actually been, and that any attempt to exercise the power theretofore had been unlawful, except in cases within some classification made by the act. Coming when it did, it must be taken as an expression of the view of Congress that facts analogous to those in the Peck Case do not constitute contempt as the law was and should be. There is nothing to suggest that the intention was to include in the limitation a range of misbehaviors relating to an entirely different state of facts, and infinitely more mischievous in their effect to obstruct the administration of justice.

We must assume that, in refusing the suggestion of Draper that it be categorically set out what situations shall not

be within the summary power of the court, Congress intended the act to be construed in particular cases to meet particular conditions. Surely, if a great and influential agency for public direction and education, capable, in licentious hands, of directing courts to follow popular passion, were intended to be rendered absolutely immune by this act, the situation demanded that the Legislature should, and we have every reason to insist that it would, have made such intention plain, at least by general language unmistakable in meaning. That it did not, under circumstances, excludes the thought that such was its intention.

The court, in the Poulson opinion, makes against its own conclusions in saying (page 1207 of 19 Fed. Cas.).

"On the trial (of Judge Peck) the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause *during its pendency*, and all admitted its illegality when done while the cause was actually on trial. *It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of the Judiciary Act.* § 17 (1 Stat. 83), *as declared by the Supreme Court, to protect their suitors by the process of attachment.* With this distinct knowledge and recognition of the existing law, it cannot be doubted that the whole subject was within the view of the Legislature; nor that they acted most advisedly on the law of contempt." (Italics ours.)

If we follow the decision, then, we are forced to say that Congress, in declaring what the law is and had been, in intention and in effect worked a revolution of the law, condemned an application that theretofore had been undebatable, and, in compassing this intentional upending of principles which not only federal courts were applying to the satisfaction of everybody, but which no state Legislature at that time had attempted to change except Pennsylvania, language was used requiring strenuous effort at construction in order to get even a glimmer of such a purpose. We submit that upon the whole view it is more probable that Justice Baldwin's opinion was influenced by the Pennsylvania law, than that Congress was moved by it to work an awkward and obscure imitation.

Finally, to close this part of our opinion, we quote from a court whose state early adopted the federal act to be applied to its own courts. Saying (State v. Galloway, 5 Cold. [45 Tenn.] 326, 330 [98 Am. Dec. 404]) that the local statute was similar to the federal act, Poulson's Case is thus criticized:

"It is altogether probable that the *breadth of expression* employed by Judge Baldwin, to declare the immunity of the press, may require limitation, in case the matter published be of a character, and vicinity to the court, so as fairly to bring it within the class prescribed by the Code, which consists in 'the willful misbehavior of a person so near to a court as to obstruct the administration of justice.' See Poulson's Case, cited and commented upon in I Kent's Commentaries, 301."

The comment in Kent's (second edition) was in a footnote by Chancellor Kent himself, who characterized the law as interpreted by Justice Baldwin, to be *unreasonable* "in leaving the suitor unprotected at the moment when he stands most in need." Evidently the Tennessee court agrees with the chancellor.

Judge Jones, in Ex parte McLeod (D. C.), 120 Fed. 130, 137, 138, 139, put the matter very clearly in discussing the act of 1831. He says, with reference to the particular phase now before this court:

"It is questionable, to say the least of it, whether Congress intended to take away from the courts the existing common-law power to punish, as for a contempt, improper efforts, in the guise of published statements or comments, pending the trial of a particular case, to secure judgment therein, in obedience to the dictates of passion or prejudice, or to thrust other ulterior considerations before the tribunal, against which justice and the law seeks to guard judge and jury in the trial and decision of causes. * * *

"As we have seen, the chief purpose of the statute 'declaratory of the law of contempts of court,' approved March 2, 1831, which is now codified in section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), was to prevent the punishment, as for contempt, of what were really only the exercise of free speech and liberty of the press in criticizing judicial officers and acts, and chronicling the doings of the courts. * * *

"We cannot, in the absence of words forcing that conclusion, impute any design to Congress, in dealing with an evil exercise of the power, to destroy also the existing right to exert this power for good, in upholding the purity and independence of the courts. The words do not demand such a construction, and to give them effect would deny powers very essential to courts in 'the administration of justice.'"

It is urged that the statute should be construed literally because of its penal character. It should be construed narrowly as defining the limits of a summary power, but the construction should consist with the important function which that summary power serves; it should be given its reasonable intendment. United States v. Antikamnia Co., 231 U. S. 654,

658, 34 Sup. Ct. 222, 58 L. Ed. 419. The fact that it deals with a power inhering in courts independent of the Legislature, one essential to the execution of their duties and the maintenance of their proper authority, is an important factor of construction. The interpretation should not be so narrowed as to emasculate the very function it declares. United States v. Shipp, 203 U. S. 563, 575, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. The proper construction, it seems to us, is to leave a power reasonably consistent with a freedom in the courts to consider and determine causes uninfluenced by any agencies except the law and the facts properly brought to their attention.

We are cited to the case of Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, and to that part of Judge Fields' opinion, which, paraphrasing the statute says:

"As thus seen, the power of these courts in the punishment of contempt can only be exercised *to insure order and decorum in their presence*, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." (Italics ours.)

In this case Robinson sought to be relieved from an order disbarring him for an alleged contempt. It will be seen that the order did not result from a finding upon a rule on him to answer to a charge of tampering with a grand jury witness, which was the first charge, but was occasioned by an alleged indignity offered the court directly in its presence. Page 507 of 19 Wall. (22 L. Ed. 205).

The court below did not pass upon the rule at all, nor does Judge Field say anything more (19 Wall. page 511, 22 L. Ed. 205) about the alleged offense of Robinson respecting the witness than that the grand jury's report does not make a case. The case therefore does not turn upon an interpretation of the statute in this particular before us. The peremptory writ to restore him to the bar was awarded: First, because disbarment cannot be made a punishment for mere contempt; and, second, because the power to disbar can be exercised only after notice has been given and opportunity for defense. When this case is examined and the situation disclosed, it will be seen that there was no occasion for Justice Field to say, "As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order and decorum in their presence*," etc., if he meant by that that only that misbehaviors which operated to a physical interruption, disturbance, or delay in the performance of judicial duty as a court was actually sitting, was within the first classification of the act. If this case is to be given the effect

claimed for it, we are justified in insisting that the action of the Supreme Court in refusing review to McCaully (In re McCaully, 198 U. S. 582, 586, 25 Sup. Ct. 805, 49 L. Ed. 1172), to be discussed hereafter, is equivalent to an overruling of Judge Field's holding. Ex parte Robinson has been cited by the Supreme Court in possibly a dozen cases, and at times quoted from, touching its relation to the law of contempts, but in none has the Supreme Court adopted the narrow construction of this first classification of the act given in this excerpt from Justice Field's opinion.

In Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, in which mandamus was refused to restore to the bar Wall, who had been disbarred for participation in a lynching Justice Field, in a dissenting opinion, quotes his Robinson decision to the point that the proceeding should have followed the analogy of the law of contempt, and that therefore Wall could not have been disbarred before indictment and conviction for an act which did not take place in the actual presence of a sitting court; but his reasoning was not followed by any associate.

In Sharon vs. Hill (C. C.) 24 Fed. 726, Justice Field himself seems to have gotten away from his earlier notion that an interruption of a court's "order and decorum" was essential to contempt proceedings, for, sitting with Judge Sawyer, in that case, he orally delivered an opinion upon one phase, saying, "Mr. Justice Sawyer will explain for the benefit of counsel the statutes of Congress," and then heard Judge Sawyer say that the action of Mrs. Hill in threatening a witness with a revolver when an examination was in progress *before a commissioner was a contempt of the* Circuit Court within this first classification.

And the Supreme Court itself has taken issue with Justice Field's dictum in the Robinson Case in Savin, Petitioner, supra, for there it is held that an effort to corrupt a witness outside of the courtroom, although in the corridors of the court, under circumstances which had no relationship to a physical interruption of the court proceedings, was within this clause of the act. And a study of its attitude toward the facts in Cuddy, Petitioner, in the same volume (131 U. S. 280, 9. Sup. Ct. 703, 33 L. Ed. 154), suggests that the court in that case, had it been necessary, would have gone as far as did Judge Brown in Re May supra, to hold that an attempt to corrupt a juror remote from the place of the court's sitting and at an hour out of court would also be within the section.

In McCaully v. U. S., 25 App. D. C. 404, an attachment against the respondent under that part of section 268 under consideration here, for attempting to corrupt a juror at his

place of business one-half mile from the courthouse and two days before the trial of the case in which the juror was to sit, was sustained; the court saying that:

"The question is not one of geography or topography, or propinquity or remoteness, but of direct influence upon the administration of justice. * * * Bribery of a juror or the intimidation of a witness pollutes the foundations of justice at their source, and reach at once to the very seat and shrine of the administration of justice, whatever be the place where the formal act is done. Under such circumstances, the court is wherever the juror or the witness is, and there is no question of locality in the case."

The jurisdiction of the court in that case, under the statute, was the sharply contested question, and motions for leave to file petition for writs of habeas corpus and certiorari were *denied by the Supreme Court.* 198 U. S., 582, 586, 25 Sup. Ct. 805, 49 L. Ed. 1172.

We feel that these considerations dispose of In re Robinson, so far as the dictum of Justice Field is attempted to be applied here.

We now come to the case which respondents deem very important, Cuyler v. Atlantic & N. C. R. R. Co. (In re Daniels [C. C.]) 131 Fed. 95, although the facts there are not comparable to the situation here, and we would not say that, upon its facts, it was not correctly decided. The respondent was charged with having criticized severely, *after the fact,* the appointment of a receiver by the District Court of his state. So far as the opinion seems to be in any way inconsistent with the conclusion we reach here, it is found to be based upon Justice Field's attempt to limit the operation of the statute in Ex parte Robinson, supra, and upon the Poulson Case. The citations from Kent and Rapalje made by Judge Pritchard depend for their authority upon the Poulson Case alone.

The note from Kent's Commentaries is but partly quoted. It is wholly based on Justice Baldwin's decision, and we have elsewhere further considered the note and Chancellor Kent's view of the Baldwin interpretation. Likewise Rapalje supports his text statement, that the act deprived federal courts "of the common-law power to protect," by the process of attachment, "their suitors, witnesses, officers, and themselves, against libels of the press," concerning a pending trial, *by no other authority whatever* than Poulson's Case. See Rapalje, Contempt, p. 72. If therefore we are justified in not following In re Poulson and the dictum of Justice Field in Re Robinson, we may disregard In re Daniels as an authority for the proposition that newspapers are immune under all circumstances.

But the Daniels Case cannot be construed as denying the application of the statute to facts such as apear in the case at bar. Indeed, Judge Pritchard says (131 Fed. 99):

"There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

It is criticism of the judge of a court because of his official conduct, aspersion personal to him and unaffecting a pending matter, and not tending to obstruct the performance of official duty in hand, affecting the administration of justice in general only and indirectly in that court as a mere libel of the judge, which Judge Pritchard very properly decides is not covered by the statute. Such is the plain meaning of the language of the opinion (131 Fed. page 98), it was so construed by the author of the first paragraph of the syllabus to the report (131 Fed. page 95), and such construction, only, harmonizes with that portion of the opinion we have quoted above.

In the case before us, no interpretation of section 268, Judicial Code, is insisted upon against respondents which is essentially different from that allowed by Judge Pritchard in the foregoing quotation. The immediate possible effect on the administration of justice in a pending case is no clearer in a circumstance such as he imagines, than that obtaining in the circumstances in the instant case. A concession that a publication out of court *may be* the occasion of summary process under the first clause of the *proviso* of the section is all that is contended for against the present respondent, so far as the law is concerned.

We are confident that the foregoing considerations, to which, perhaps, we have given too much time, justify us in denominating as mythical and legendary the view that Congress intended *complete immunity* to the press for summary process under all circumstances.

An eminent judge of this circuit, whose industry and clarity of thought and expression always illuminated a subject under his full consideration (Hammond, J., in U. S. v. Anonymous, 21 Fed. 761, 768), expressed the correct view, we think, of the act of 1831, respecting its effect on the press, in saying:

"It is generally understood that the object of that statute

* * * was to enlarge the liberty of criticisms by the press and others by *curtailing* the power to punish adverse comments upon the courts, their officers and proceedings, *as contempts which tend to impair respect for the tribunal,* and *thereby* obstruct the administration of justice."

That is to say, the power is *curtailed,* not wholly destroyed, so that criticisms which tend to reflect generally upon the court, either by libeling the occupant of the bench, or by criticizing proceedings and processes, but which have no tendency to affect a cause under consideration, are not reached by the statute, although they may, in a general way, obstruct the administration of justice, particularly through fostering a disrespect for the tribunal. Examination of cases arising under statutory limitations no broader than those of the federal act, and in which respondents were discharged, show that it was precisely this criterion which relieved them. State v. Edwards, 15 S. D. 383, 89 N. W. 1011; In re MacKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; Dunham v. State, 6 Iowa, 245; Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; and other cases. This is undoubtedly the only sound conclusion to be reached after a study of the act, and vindicates alike the liberty of the press and the right of a court to consider any cause before it "free from outside coercion or interference" specially directed to such pending cause.

The only view to be taken of this act consistent with its history, its relation to the accepted law of the time, and with the inherency in every court of a power of protecting its suitors and itself, is that taken by the Supreme Court of Virginia in Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310:

"That although the United States statute of 1831 carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties."

And so Judge Hammond says, in the case cited (21 Fed. 761):

"The courts will find that the Legislature has not taken away any valuable power, when these statutes are properly understood. * * * The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects beside the place where it happens. * * * Whenever the conduct * * * ceases to be general in its effect, and invades the domain of the court to be specific in its injury, by intimidating or attempting to intimidate, with threat or otherwise, the court or its officers * * * while in the discharge of their du-

ties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization, for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be."

Following United States v. Anonymous, federal authorities are consistent in applying the principle that the criterion whether a given act is "so near the presence of the court as to obstruct the administration of justice" is not in the physical propinquity of the occurrence to the court, but abides in the degree of approximation the act attains in affecting an immediate duty before the court; that there may be invidious acts or misbehaviors occurring remote from the physical presence of a sitting court, in place or time or both, yet so direct in their tendency to affect the administration of the court's duties in a pending cause as to be an obstruction thereof, and, consequently, within the statute. It is the quality of obstruction to the administration of justice that measures the propinquity of the act to the court. This was Judge Brown's idea of the law in Re May, supra; and it must have caused the Supreme Court to refuse a review of McCaully vs. United States, supra. Sharon v. Hill, supra; United States v. Patterson (C. C.) 26 Fed. 509; In re Brule (D. C.) 71 Fed. 943; Ex parte McLeod (D. C.) 120 Fed. 130; United States v. Carroll (D. C.) 147 Fed. 947; United States v. Zavelo (C. C.) 177 Fed. 536; Kirk v. United States, 112 C. C. A. 531, 192 Fed. 273; In re Steiner (D. C.) 195 Fed. 299, 303; United States v. Huff (D. C.) 206 Fed. 700.

As the Supreme Court, in the Savin Case, supra, destroyed one of the two reasons given by the court for the Poulson decision, so the authorities just cited, as the facts of the respective cases are examined, unanimously take issue with Justice Baldwin's other and more important reason, and justify the conclusion we have given in the preceding paragraph. Of these the opinions of Judge Gilbert, for the Eighth Circuit Court of Appeals (Kirk's Case), and of Judges Jones and Grubb (the McLeod and Huff Cases), cover the ground so completely relative to the proper interpretation to be placed on the provision that the misbehavior must be *"so near"* to the court's presence *"as to obstruct* the administration of justice" that it were supererogation to say more.

We call attention to Judge Gilbert's language (192 Fed. page 277, 112 C. C. A. page 535) as expressing precisely the view we hold of the statute's exact purpose respecting newspaper comment, that it was and is "to limit the power of federal courts to punish as for contempt criticisms of judicial de-

cisions or judicial officers." We hold respondents here for a criticism neither of a judicial decision nor of a judicial officer, but for publications affecting prejudicially proceedings in a pending case. The distinction is plain between an ex post facto comment on a decision, or a mere libel of a judge, on the one hand, and, on the other, an effort by publication to affect the consideration of a case pending its decision, or to excite prejudice against an anticipated decision. We agree entirely with Judge Grubb's theory that no legitimate distinction may be drawn, to limit the application of the statute, between that kind of obstruction to the administration of justice, respecting a pending cause, which involves the relation of jurors, witnesses, and examiners to the court, on the one hand, and matters affecting the judge of the court in his relation to the case, on the other.

In the Huff case the sitting judge received at his house a letter calculated to affect his official action respecting a pending case. If this case is correctly decided, and Judge Grubb's reasoning is convincing, then newspaper criticism tending to affect the relation of judge and parties to a pending cause must be equally within the statute, for there can be no controlling distinction, to apply the statute in one case and to avoid it in the other, between a written attack on the judge reaching him in the privacy of his home and one spread broadcast, by the thousands of duplications, under the eyes of his fellow citizens as well as under his, in his home city wherein his court is held.

The modern law of contempt by publication is precisely that for which we are contending here as applicable to this court and as not abrogated by the statute. Bishop's New Criminal Law, §§ 259, 260, 261; Bailey, Habeas Corpus, c. 7; Oswald, Contempt, pp. 91, 92, 97; Rapalje, Contempt, §56; 9 Cyc. 20. No state, except Pennsylvania and Kentucky, in all the years since Peck's trial, has attempted by legislation to put the press in a class by itself as privileged to interfere with the administration of justice in a pending case. No case is reported, except those criticized above, in which newspaper comment tending to embarrass the court with reference to a pending cause, and not being a mere libel on the judge, is not held to be punishable summarily as a contempt. Century Digest, Decennial Digest, American Digest, Title, "Contempt."

We will discuss but a few of the more important cases for the light they afford. The authorities they cite need not be repeated in this opinion. It is obvious that cases which decline to admit the province of a Legislature to limit a court's power by definition of what shall be considered to be an attachable contempt, such as the important case of State v. Frew,

24 W. Va. 416, 49 Am. Rep. 257, are not valuable as authority so we consider some of those only which apply statutory provisions.

Oregon and Washington by statute make "disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceeding" attachable. In each state it is held that publications tending to embarrass the court in the consideration of a case before it are within the operation of this language. State v. Kaiser, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584 (in which the respondent was relieved only because it was adjudged that he did not publish of a pending cause); State v. Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.

In Iowa the statute provides for summary punishment of "contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority." Under this provision the summary punishment of an editor was sustained for publishing an article ridiculing one of the parties and denouncing the witnesses in a pending trial. Field vs. Thornell, 106 Iowa, 7, 75 N. W. 685, 68 Am. St. Rep. 281. The court said:

"The language of the statute does not require us to adopt a construction which will cripple the administration of justice, and deprive parties and the state of the hearing of causes unmolested by extrinsic influences, whether within or without the actual presence of the court. * * * * The question arises, then, whether the court may, by contempt proceedings, protect witnesses from denunciation and intimidation by the public press, and the jurors from the influence created thereby. * * * We have discovered no authority denying the power of the court to punish as contempt an act which tends to impede, embarrass, or obstruct it in the discharge of its duties."

In Nebraska contempt may consist of "any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceeding or process pending before the courts." It is settled in that state that "a publication regarding a cause, during its pendency in court, which tends to corrupt or embarrass the administration of justice, and to produce a prejudice in the minds of the public with respect to the merits of a cause," is punishable within the statutory description. Percival v. State, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568; Rosewater v. State, 47 Neb. 630, 66 N. W. 640; State v. Bee Publishing Co., 60 Neb. 282, 83 N. W. 204, 50 L. R. A. 195, 83 Am. St. Rep. 531.

In North Carolina it is provided (section 648, N. C. Statute) that direct contempts shall consist "in disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in the immedite view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority." The Supreme Court of the state (Ex parte Schenck, 65 N. C. 368) held that this statute did not restrict the constitutional power of the courts, and, in an elaborate and recent opinion (Ex parte McCown, 139 N. C. 95, 122, 51 S. E. 957, 2 L. R. A. [N. S.] 603) held that an assault upon the judge of the court, at the latter's boarding place and during the evening recess of the court, was within the statute; this altercation having reference to a case as to which judicial function had not ceased.

We have already referred to the view of the Supreme Court of Tennessee as to the applicability of the statute of that state to a case like this at bar. Georgia also has a statute in imitation of the federal act. In Baker v. State, 82 Ga. 776, 9 S. E. 743, 4 L. R. A. 128, 14 Am. St. Rep. 192, a suitor, whose case was not yet on trial, who in the courtroom, in the presence of several of the venire for the term, five or seven minutes before court was to convene for the morning, persisted in discussing his case with the judge, was found to be in contempt within the statute. In Wynn v. City & Suburban Ry., 91 Ga. 344, 17 S. E. 649, it was held in face of the contempt statute, that it was not error for the trial court to say in its charge to the jury in a personal injury case that it proposed to attach for contempt the publisher of a newspaper improperly commenting on the pending case.

We have noted that Ohio has a contempt statute on the lines of the federal act. In Steube v. State, 3 Ohio Cir. Ct. R. 383, 2 O. C. D. 216, the meaning of the words "misbehavior in the presence of the court, or so near thereto," etc., in the statute (section 5639, R. S.; section 12136, General Code Ohio; Act of 1834) was under specific interpretation. In a case where a stranger to a case on trial had, at recess and at a place five blocks away from the courthouse, assaulted an attorney in the pending case because of his connection therewith, the court held the statute applicable, holding:

"Whatever acts are calculated to impede, embarrass, or obstruct the court in the administration of justice, are considered as done in the presence of the court."

The McCown, Baker, and Steube cases are cited to support the departure of the federal courts from the nar-

row interpretation of the federal act found in Poulson's and Robinson's cases, and have no other importance, not being newspaper cases; but Ohio does furnish a case closely parallel to the instant proceeding. In Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691, it was held that the act of 1834, now section 12136, G. C. Ohio, could not be regarded as limiting powers inherent in the court of common pleas, as that was a court created by the Constitution; but in Myers v. State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638, the court did not consider the statute in any other way than as controlling the common pleas court, and expressly found the publication involved to be within it. The statute (then section 5639, R. S., now section 12136, G. C.) provided summary punishment of "a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." Myers had been jointly indicted with another for certain election forgeries, and had been given a separate trial. Pending the trial of his codefendant in the city of Columbus, Myers caused to be published an article in the Cincinnati Inquirer attacking the trial court with reference to the case. The Supreme Court said (46 Ohio St. page 490, 22 N. E. 44, 15 Am. St. Rep. 638):

"The publication came within section 5639, Rev. Stats. * * * It is true that the article was not written, nor was it circulated by the respondent, in the presence of the court. Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the courtroom, as well as elsewhere. It was intended to have effect, and did have effect, in the courthouse at Columbus, and the writer was just as much responsible for that effect as though he had in the courtroom itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libeling words verbally."

It was a fact shown in that case that the paper in question circulated generally in the city of Columbus. The court reasoned that it is because the publication evinced an intention "to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus bring it into contempt; to influence the people against it; to lead them to believe that the trial then being conducted was a farce"; and because it had a tendency, "when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment"—that it "tended directly to obstruct the administration of justice in reference to the case on trial," becoming therefore a contempt of court. The court further said:

"The statute clearly authorizes, as did the common law, courts to punish summarily, as contempt, acts calculated to obstruct their business."

This case is not only important as construing a statute in terms quite like that controlling this court, but as settling the law of the local jurisdiction within which respondents' offensive publications were had. It is plain that, had respondents been convicted of criminal contempt of a state court under circumstances such as those before us, they could get no relief from federal authority. Patterson v. Colorado, supra.

Three cases from very respectable state courts may be selected to support, if support is needed, the argument of the Supreme Court of Ohio that offensive publication tend directly to obstruct justice. In People v. Wilson, 64 Ill. 195, 211, 16 Am. Rep. 528, the dictum in Stuart v. People, 3 Scam. (Ill.) 405, under a statute giving a court power "to punish contempts offered by any person to it while sitting," was approved and the holding followed that:

"In this power would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court."

This case is not reversed by Storey v. People, 79 Ill. 45, 22 Am. Rep. 158, for the latter was decided not only under different state legislation, but dealt with a publication relating to a past court transaction.

In Telegram Newspaper Co. vs. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, it is held that, in a publication which "amounts to a contempt of court because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt in the presence of the court."

In State v. Howell, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141, 13 Ann. Cas. 501, the court in holding that proof is not necessary that the offensive article was read by jurors, said:

"A sentiment favorable or unfavorable to one of the parties to the case may be made to so pervade the community as to reach the courtroom and the triers and interfere with the fair and impartial performance by the latter of their duties."

Finally, on this subject, State v. Myers was cited with approval by the Supreme Court of the United States in

Patterson v. Colorado, supra, to the point made in that opinion (205 U. S. 463, 27 Sup. Ct. 558, 51 L. Ed. 879, 10 Ann. Cas. 689), that:

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives, will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

Of the cases above considered, Tugwell's, Rosewater's (Omaha Bee), Myers', and Patterson's were each instances where the misbehavior was alleged to have been with an intent to embarrass and influence the court in the performance of its duty. We are unable to find applicable to the language of the federal statute (section 268, Judicial Code) any reasonable construction which will relieve respondents in this case for the consequences in contempt for improper comment on a pending cause which involved the parties in the several proceedings reviewed.

It is nothing that no federal court in a reported case has ever hitherto so applied the statute. The language of this measure does not exclude its application to newspapers, and one court of appeals in a dictum has suggested that it may be so applied, as we have seen, in Re Daniels (C. C.) 131 Fed. 95, 99. We may employ the language of the Supreme Court of Nebraska (State v. Bee Publishing Co., supra) in partial explanation of the absence of reported federal cases, that:

"Courts have not often called publishers to account for constructive contempts, because it has rarely happened that a public journal, wielding any considerable influence, has deliberately employed outlaw methods in attempting to control judicial action."

Or that of the Supreme Court of Iowa (Field v. Thorell, supra), that it seldom occurs "that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary or seek to control or improperly influence its conclusions."

On this subject, the Supreme Court of Colorado noted (People v. Stapleton, 18 Colo., 568, 33 Pac. 167, 23 L. R. A. 787), with respect to newspaper contempts, that:

"It is a matter of common observation that the courts of this country are reluctant to exercise the extraordinary power vested in them."

We hope that it will occur to those who may take an interest in the instant case that the fact that an endurance of the News-Bee's uncommon treatment of the case pending in this court was sustained for nearly six months, before action was taken to call it into question, is some evidence of a reluctance, on the part of this court, to exercise its extraordinary power in contempt.

It needs no argument that this case has all the incidents of a criminal proceeding, and that defendants can be held only after competent evidence with the unequivocal deductions from the facts proven thereby disclose their guilt beyond a reasonable doubt.

The defenses interposed are: (1) A want of jurisdiction to entertain any of the causes or proceedings concerning which the several alleged publications were uttered. (2) that these publications were all within respondents' privilege as fair and proper comments and accounts of matters of public interest. (3) That none of the publications tended to embarrass the court in any way or to obstruct the administration of justice. (4) A disclaimer of intention to produce any such result.

Want of jurisdiction is asserted to have existed to hear the Doherty case for any purpose because of the claim that the city was not a proper party thereto, wherefore the issue respecting the ordinance could not be heard and determined by this court. This is that line of defense peculiar to the first count.

In the matter of the second and third counts, it is claimed that the court had no jurisdiction over the Quinlivan proceedings because the latter was sought to be held under an order bearing the title of the traction case, wherefore no jurisdiction was had to attach either the present respondents or Howard for contempt with reference to the Quinlivan case nor respondents for comment on Howard's case. It is also offered in evidence, but not pleaded, that no affidavit had been filed to support the court's order citing Howard for contempt.

We do not understand the practice to be settled that the judge of a court needs an affidavit to precede a citation for contempt the facts supporting which are matters of his own personal cognizance. Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

Respecting the point that the Quinlivan order was in the original equity case by title, counsel seem to misread the case of Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The proceedings under the Quinlivan order are not brought into the record by respondents, and, of course, it will not be presumed that there were therein any of the fatal weaknessness found by the Supreme Court in the Gompers case; for we do not understand the court to find the issue of the rule under the title of the equity case to have been a matter so serious as to destroy of itself jurisdiction. Under the authority of In re Kaplan Bros. (Third Circuit Court of Appeals) 213 Fed. 753,—C. C. A.—, which discusses in this particular the Gompers case, jurisdiction of Quinlivan was not lacking for this reason.

On this defense we are referred then finally to the status of the traction case, and it seems to be respondents' theory that, if jurisdiction of that case were absent, it was entirely safe for any one to indulge a line of conduct respecting it and proceedings attempted in it which might be unsafe as in contempt if jurisdiction were present. No extensive argument is now necessary upon the question that this court had jurisdiction of the traction case. There is nothing in its record to indicate collusion to cast a fraudulent jurisdiction. The plaintiffs were citizens of another state. Their right to insist on the preservation of their debtors' equity of redemption against confiscatory assaults cannot be doubted. That the enforcement of the ordinance would be to waste the traction company was a triable issue, and that such was a fact the city admitted after a contest. Plaintiffs, as well as the company, had a right to contend that the franchise did not expire at the time when the city sought to apply its day by day ordinance, and that therefore to enforce the ordinance would be to impair a contract. That the city could not compel the company to continue its service, whether the latter wished to or not, is a justiciable proposition; likewise, the further insistence that the city could not prevent the compay from removing its cars from the streets after the expiration of its franchise. That, even after expiration of a franchise, rights remained in a traction company to use the streets in a reasonable way, subject to reasonable conditions imposed by the city, until the city should summarily direct such use to cease, was decided by the case of City of Detroit v. Detroit United Railway, 172 Mich. 136, 137 N. W. 645, and in that particular this case is in no wise affected by the decision of the Supreme Court of the

United States, affirming the Supreme Court of Michigan, reported 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056.

One incident affecting jurisdiction counsel overlook: The ordinance did not provide specially that, as an alternative to the rates of fare, the company should abandon the streets. Had it done so, there would have been no justiciable question, for the measure would have been self-enforceable, and, however, confiscatory and impracticable the rate, within the power of the council to pass, for, with the power to order the company off altogether, the council might couple with the exercise of that power the alternative of an unreasonable condition for continuing service. There was in the case, then, not the question of what the rate should be, which is a legislative and therefore a non-justiciable question, but what the c ndition of use should not be, which is a proper subject for judicial inquiry.

These considerations are sufficient to confer jurisdiction. Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; Siler v. Louisville & Nashville Railroad, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Carroll v. C. & O. Coal Agency Co., 124 Fed. 305, 61 C. C. A. 49; Pensylvania Co. v. L. E., B. G. & N. Ry. Co. (C. C.) 146 Fed. 446.

It is entirely clear, however, that this issue cannot be collaterally raised. Jurisdiction is a judicial question present in every litigated case. Sometimes it is too plain for contention. Where there is doubt, it is to be decided by the exercise of exactly the same judicial functions operative in case of any other legal proposition. It is preposterous that, when it is an actively controverted issue, a newspaper has more liberty with the court on a chance that jurisdiction may finally be found wanting, than it would enjoy if some other legal inquiry were the subject of consideration.

Comment reflecting on a court respecting a case before it is contempt of a different character from that involved in disobedience to an order of court. As to the latter, of course, want of jurisdiction to make the order is a complete defense to attachment for disobedience. In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. On this subject the Supreme Court of Colorado says, in Cooper v. People, 13 Colo. 337, 378, 22 Pac. 790, 802, 6 L. R. A. 430, 443 (a newspaper contempt case):

"But were we to concede that the jurisdiction of the district judge in the premises was doubtful, the position of respondents would not be materially different; for, if

substantial doubt on this subject exists, pending the solution of this doubt, in good faith, and in a proper manner, the orders and proceedings of the court or judge are entitled to the same consideration as when no such objection is made. As we have said in another case, days of patient and careful investigation are sometimes necessarily consumed before the want of jurisdiction becomes apparent; and an admission that during this investigation witnesses may decline to testify, interlocutory orders may be disobeyed, and the proceedings may be treated with public contumely, would operate to deprive the court of power to determine the very point of jurisdiction itself."

The record of the Doherty Case shows that the judge gave the question of jurisdiction careful investigation, holding it for consideration until long after the facts had suggested the court's duty if it were present. We need say no more on this defense. The last word was said by the Supreme Court in United States vs. Shipp, 203 U. S., 563, 573, 27 Sup. Ct. 165, 166 (51 L. Ed., 319, 8 Ann. Cas. 265). There it was objected, on grounds similar to those urged here, that respondents could not be held in contempt of the Supreme Court for permitting the lynching of a prisoner whose petition for writ of habeas corpus had been denied by the local federal Circuit Court and who was prosecuting an appeal to the Supreme Court. The court said:

"But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. * * * Until its judgment declining jurisdiction should be announced, it had authortiy from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time."

The argument that the publications in question do not tend to obstruct justice proceeds wholly on consideration of each as an isolated act. Much, of course, of the matter pleaded in the information, is entirely beyond criticism, and we conceive that the pleader is not insisting otherwise. Other matters are, at least, disagreeable, and with this quality are of some importance only as light-giving parts of the res gestae. Others are, at least, technical breaches of the paper's privilege which, if but isolated lapses from proper comment, a court should not hastily take under consideration; but, as parts of a series on the same subject and in the same line of offensive

criticism, they severally gain in force. Others still are individually so strong that each carries its own power for mischief.

The rule is that, when there is no ambiguity in the language intent to effect what the language tends to effect is presumed against a sworn disclaimer of such intention. Ex parte Nelson, 251 Mo., 63, 157 S. W., 794; In re Chadwick, 109 Mich., 588, 67 N. W., 1071; Fishback vs. State, 131 Ind., 304, 30 N. E., 1088. Of course, the question of ambiguity is to be decided by considering the context and, to some extent, the res gestae. Henry vs. Ellis, 49 Iowa, 205. Respondents should be held for what appears in their paper of any issue pertinent to the subject under inquiry, and a full understanding of what is said in one place may be attempted by referring to what was elsewhere in the issue said on the same subject, and, if that subject is one discussed by the paper over a period of time, what is said in one issue may have an interpretative effect respecting matters appearing in other issues. A proceeding for newspaper contempt partakes of the incidents of any other action for defamation, and other publications on the same subject before and after the date of that declared on may be offered for interpretation, at least, on the matter of quo animo, as in libel. Post Publishing Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201 (Sixth Circuit Court of Appeals); Van Derveer v. Sutphin, 5 Ohio St. 293; Larrabee v. Tribune Co., 36 Minn., 141, 30 N. W. 462; Commonwea'th v. Damon, 136 Mass. 441; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123; Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624; Cushing v. Hederman, 117 Iowa, 637, 91 N. W. 940, 94 Am. St. Rep., 320; Bee Publishing Co. v. Shields, 68 Neb. 750, 94 N. W. 1029, 99 N. W. 822.

In a disbarment case in which the question of libel was involved, the Circuit Court of Appeals for the Sixth Circuit (Thatcher v. United States, 212 Fed. 801, 810, —— C. C. A. ——) says of the claim that the publication was proper:

"The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialecticians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and in the leaving of pegs whereon they might hang technical justifications; it was prepared and published to be read by and to influence a class of the community not skilled in these things, and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw. * * * It cannot be con-

sidered as if it had been put before an audience of lawyers who would not be misled by its absurdities, or as if composed by laymen who could be excused by their ignorance."

Tested by this appropriate rule, no ambiguity attends some of the publications separately considered, and none of those upon which the court makes a finding herein have that infirmity, when treated as respective parts of a series on the same subject, and when the light from circumstances known and commented on by respondents' paper is given them. The background against which they all stand, and which develops their force and capacity for mischief, is the excited state of public feeling pictured in the News-Bee's account of the council meeting of March 23, and the intense public interest in the traction case of which respondent Cochran testified.

The traction case stood then, March 24, under a handicap involved in asking consideration of a question upon which a large part of the community in which the court sat had arrived, assisted by respondents, at so definite and insistent a judgment that any suggestion, even official, of moderation of temper, and any argument seeming to favor the plaintiffs, met with public objurgation.

That this situation, without more, offered some embarrassment to the court is quite obvious and could not have escaped as shrewd an observer and as experienced a newspaper man as respondent Cochran, and it is not easy to follow with sympathy his disclaimer that the subsequent publications of his paper, some of which he wrote, had no purpose to add to that embarrassment.

They were surely capable of the mischief attributed to them in the information. It is not material that a definitely formed intention to that end was ever held by respondents, if the utterances were recklessly made or in pursuit of a journalistic policy seen to be against public policy when persistently followed. However, so far as any interpretation of them respecting intent is necessary beyond their language—and we thing none is—aid is had from the two chief witnesses for the defense, respondent Cochran and Managing Editor Howard. The former said that the paper's policy was to print all the news under an "implied contract" with its patrons to that end, that he himself wrote, not for lawyers and dialecticians, but for a "lot of human beings and to make them understand"; that he "wanted to get the punch in there so it would get to them and make them think" and to "keep up the public interest"; that if he had not been writing down to the people, but for lawyers, his "language might have been more ladylike." He complacently admits that he uses a vernacular which conveys special meanings to the particular class he aspires to lead. Mr. Cochran and, through him, the corporation respondent

which gives him responsibility to speak for it, cannot complain if here the rule in Thatcher v. United States is applied, and that their language, profuse use of staring type, and other peculiarities of expression, not forgetting that, with reference to the traction case, preversions, distortions, and prevarications respecting court proceedings are not neglected, are considered in an effort to see what "punch" got to their readers, what thoughts the latter were sought to think, what meanings they were intended by respondents to draw. Mr. Howard testified frankly in line with Mr. Cochran, and further said that the paper endeavored to emphasize, by repetition and otherwise, the salient features of the day's happenings; and that is his explanation for the triple repetition of the stated purpose of the city solicitor to exceed his official duty in protecting those individuals who should stand upon their assumed rights to ride for three-cent fare, although the question had been relegated for judicial determination. He admitted that some of the publications were intended to comment upon proceedings had in the pending case, notably the editorial on holding court over the telephone, which, he said, was the paper's comment on a circumstance which the paper considered to be a vital crisis in the case. It doubtless had not occurred to Mr. Howard that the only possible effect of the court authorizing by telephone the entrance on the 24th of March of an order of whose tenor the judge was well informed, and which he actually signed on that day and caused to be returned as signed to be filed at the beginning of business on the subsequent day, was to give the city of Toledo a day's extra notice of the fact that it was to meet the attack of the plaintiffs. No possible prejudice ensued, and, if the time were critical for the city, the court, in the action which was so unfavorably commented upon by respondents, gave it an additional time in which to prepare.

Reluctantly, however, Mr. Cochran was finally forced to admit that in times of great public excitement, affecting a case pending before a court, a paper is not privileged to print as matter of news a matter which may be seen reasonably to add to that excitement. The justification, however, through a right to print the news, does not exonerate respondents from responsibility here for any of the editorial comments complained of; for no one of them can be considered to be "news." Assuming, considering the intensity of the situation manifest Tuesday morning, March 24, that it was proper as a matter of news, and, in the same article which carried the statement that the court was asked to pass on the fare question, to announce that the city solicitor would protect any one who chose to exercise his private judgment in the matter—an action which would be manifestly beyond the solicitor's official authority—why, if to state a matter of news were the only mo-

tive, should this absurdity be mentioned four times and be made the subject of two headlines, and why, in that connection, was it necessary to publish the fact of the mayor's indorsement?

Again, if it were desirable as a matter of news to state that a mass meeting was proposed for Friday with an anarchistic afterpiece, the most ordinary consideration of the delicate position in which the intensity of public feeling placed the court would, it seems, have forbidden the incendiary extravagances of headlines, repetitions, and sensational treatment which marked, to the point of advertising with the paper's approval, the announcement of the project to hold a mass meeting Friday night in Memorial Hall "restraining order or no restraining order by the federal court, to test the strength of the three-cent fare all day ordinance." And, if a public duty were felt to demand, in the same issue which so elaborately advertised this proposed test of the ordinance en masse, that the city increase its professional representation in the court lest the "franchise manipulators" get a "strangle hold" on the people by unduly impressing the court with their "high-priced legal talent," there was no reasonable or respectable call to carry the argument into an unmistakable reflection on the court.

Of course, editorial utterances of a newspaper are voluntary—no consideration for a timely presentation of current events constrains the manner of expression of editorial opinion. Hence it may be observed that, if respondents were not committing their paper to the public disorder feared for Friday night, it was with amazingly bad judgment that they chose to say, editorially, on the 26th, that the police would not use their clubs on recalcitrant car riders that night, indorsing in that connection apparently the alleged opinion of Sam Jones that "the law was only what the people will back up."

The manner, too, in which news matter is treated in the writing is, of course, purely a question of editorial policy. So it is submitted that, if the News-Bee were intending to respect the tribunal to which the question was referred, it was a most unfortunate use of terms to say of the members of the Central Labor Union in attendance at the Memorial Hall meeting:

"These men may furnish the sinew to see to it that three-cent fares are accepted by the conductors."

This statement was not a matter of news. It was merely an expression of opinion by the writer as to the source from which physical force to accomplish the purposes in question might be derived. It was doubtless a case of "getting in the punch."

It is seen, then, that to a situation already highly inflamed the issues of the 24th 25th, and 26th of March of respondents' paper do nothing less than offer additional fuel: (1) Through

an assurance, March 24, made so often and so plainly as not to be overlooked, that he who contributed to the disorder feared for Friday night would be protected by the city's law officer. (2) By advice, on the 25th, to those of its readers who were disposed, by the announcement of official protection given in the previous issue, to take the law into their own hands, that they will have mob support as the result of a meeting in Memorial Hall called for specific action, "restraining order or no restraining order" from a court whose judge is so temperamentally and mentally uncertain that its decrees, if unpleasant, are entitled to questionable respect. (3) By, on the 26th, bracing timorous readers, who hesitate to join the crowd, with the admonition that they may not fear restraint from peace officers of the city, nor be deterred by lingering respect for law and authority, because, forsooth, the time has come when law is just what public passion, aroused by such publications as these, deems for the time being should be respected.

No innuendo is needed to suggest the tendency of these publications. They are unambiguous toward an unmistakable addition to the burden of both suitors and court taken on when the motions were filed. The language is not susceptible of two interpretations—it tends in no direction save that charged in the information.

Respondents cannot escape responsibility for the evident tendency of their publications by proof of the truth of their statements. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761. Newspapers have more than the truth to think about; they must consider the effect of stating the truth.

Besides the satirical and reflective comment over "holding court over the telephone," admitted by Editor Howard to voice the paper's disapproval of the court, there is another case in which there is an acknowledgment that an intention existed to reflect on the court. After the case for the plaintiffs had been heard, August 14, with testimony that the ordinance was confiscatory, the court, on application of the city, considerately gave it more than three weeks to make its proof in support of the ordinance, adjourning the hearing until September 8th.

On September 5 respondents uttered the satirical editorial note coupling Judge Killits with plaintiff Doherty and classifying the two with one Peter Parker, a former butt of the News-Bee's satire. Counsel for respondents, in the written argument in support of their demurrer, justify this publication in these words:

"We do not believe that this expression of confidence that the people themselves were able to handle the street railway situation without the assistance of the courts was in any way unwarranted."

The spirit of this comment is the keynote of the explanation and interpretation for every publication in question, for it is entirely the spirit of the testimony in this case given by respondent Cochran. It has the same flavor of suggestion that the court, in deigning to permit the traction suit to enter its dockets, was trenching upon the prerogatives of respondents to settle the controversy. We are able to understand now the extravagances of expression, the lurid typographical exaggerations, the misrepresentation of the court in headline after headline, and in text and editorial, the consistently unfriendly attitude against the court. For more than ten years, as they say, respondents have fought the Big Con, and it should not now be that the latter should enjoy the resource of the courts unmolested—respondents, as the self-appointed guardians of the people, had reached a verdict on the traction question which should not be disturbed by the judiciary.

It must be conceded that the headlines of the issues of March 26, August 14 and September 10 convey information at variance with that of the news articles which, respectively, follow. It is urged, by way of defense that each headline should be considered in connection with the enlarged article. March 26, the line, "Killits Upsets Low Fares," set in type exactly the size and style of the capital letters of the title to the paper, extending clear across eight columns of the paper, is the feature of the front page. The body of the article makes it plain that the statement is entirely false, as nothing is there told, nor did anything in fact happen, which tends intelligently to make that headline a truthful statement. The same may be said of the headlining of the other two issues referred to.

But we are told that whatever uncertainty or error abides in this extravagant headlining is corrected by the truthful news account underneath. It is a naive defense that the veracity of an extended news account should be accepted as an antidote to the prevarication in the headlines in large type, from which the paper's reader gets his first impression of the facts reported and, doubtless, in many instances his abiding interpretation of the full account which follows. Granting the right to "get the punch" in the writing and to emphasize the "salient features" of the case, respondents are still held to a responsibility to state the truth when they comment on the court's proceeding in a pending case.

Of course, if these false headline statements were but isolated offenses, or if they could be referred to mere blundering in "make-up," the court's duty to pass them in silence would be obvious; but they accord too clearly with the entire policy of the paper, they take their places too plainly in the file

of consistently invidious comments on the court respecting the pending case, not to be considered as reflecting respondents' attitude toward the court and the cause. They join the more detailed and elaborate offensive publications to connote an intention to control the issue in the traction case, or, at least, in case the court's decision does not meet the wishes of respondents, to render it of doubtful value to the prevailing party.

Undoubtedly, one of them, that which said, August 14, "Killits Puts Burden on the City," inspired Quinlivan's attach on the court. His discussion before the Central Labor Union, September 10, on the proposition to suggest impeachment of Judge Killits in case he decided the traction issue against the city, was based on the impression he held that the court had "placed the burden of proof of the Schreiber ordinance on the city." Nowhere else than from the misstatement of fact of the News-Bee could he have obtained such a notion, and this circumstance meets the claim that respondents' publication did not tend to embarrass the court. It is also worthy of note that this labor union meeting was held on the evening of the issue of the News-Bee containing the headline statement, in letters over half an inch high, "Low Fares Banned by U. S. Judge," over an article which told that the court had not yet reached a decision. It was in fact that day announced from the bench, but not published by respondents, although respondents had a transcript of the statements of the court and have introduced that transcript in evidence in this hearing, that the question of jurisdiction to issue an injunction was not yet decided; the city having admitted the fact that the ordinance was confiscatory and consequently void.

We may here note the curious fact that the Socialist thought, as shown in the resolutions which Mr. Howard testifies he edited for publication on September 9, ran in the same verbal channels with that of Editor Cochran. March 27, the latter wrote editorially that the Big Con "is now a trespasser on many of the streets of Toledo;" while, September 6, the Toledo Socialist Local, according to Mr. Cochran's paper, "adopted a resolution which refers to the street railway company as a trespasser in the streets." This may be a mere coincidence; but, as in case of Quinlivan's attack upon the court, it seems more likely to have been inspired by Mr. Cochran's production.

Newspaper criticism of a party to a pending cause respecting the same has always been considered as misbehavior tending to obstruct the administration of justice, even when unaccompanied by the slightest reflection on the court itself, except in those infrequent jurisdictions wherein the press has been completely immunized. That principle operated solely in

some of the cases we have cited, such as Globe Newspaper Co. v. Commonwealth, State v. Howell, and Henry v. Ellis. They proceed on the principle that a court has a paramount duty to protect suitors from anything which will interfere with a fair consideration of their rights. It was this, doubtless, which prompted Chancellor Kent to say that, "in leaving a suitor unprotected at the moment when he stands most in need," Justice Baldwin's interpretation of the federal act of 1831 was unreasonable. The court, in Cooper v. People, 13 Colo., 366, 22 Pac., 799 (6 L. R. A. 429), supra, says:

"Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or public clamor."

It follows that any newspaper comment which tends to make the position of a litigant difficult before the court hampers the efforts of the court to adjudicate the issue fairly and dispassionately. In this light, the News-Bee's editorials of March 25, entitled "Municipal Ownership, the Only Way to Street Railway Peace," and of March 27, "Big Con's Attitude is the Same Old Defiance of the People," and the cartoons, "At the Last Ditch," and "A Desperate Case," because each tends unmistakably to deride or denounce plaintiffs in the pending case, with reference thereto, and therefore tends to further inflame public hostility to them, are of themselves instances of behavior which could have no other direction than to render more difficult of performance the duty of this court toward those who rightfully had appealed to its consideration.

It is unnecessary to argue at length that the editorial referring to Quinlivan's case, of September 14—"would it be contempt to remark that it is a peculiar situation where the officer who makes the charge also considers the evidence, renders the verdict and imposes the sentence"—was meant to be contemptuous. Its language, form of expression, the typographical prominence—across two columns, in heavy black-faced type—leave no room for doubt. The repetition, in the news columns of that date, of the statement made on the previous issue-day, that "Killits has announced that he will hear the case himself"— an announcement which, if true, was not important enough for immediate repetition—obviously was to lay a foundation for this editorial and for the Dennie letter, which was also plainly in contempt. Mr. Howard, in receiving the Dennie letter, recognized by editing it that it was offensive, for he testifies that he said to Dennie, after he (Howard) had edited it, "If you will stand for it in this form, I will use it." These publications tended, without ambiguity, to weaken whatever effect a punishment of Quinlivan after conviction might properly have by way of vindicating the court's right to an unhampered consideration of the issues submitted to it in the traction case.

The so-called "declaration of independence," the two-column, front page editorial of September 17, republished in several issues after a rule had been entered on respondents for uttering it, and which is the basis for the third count of the information, is likewise too plainly an offensive—purposely so—attack on the court respecting a pending case to be within any privilege possible to an orderly imagination. The justification offered in written argument is too grotesque to be regarded as serious. It is, in substance, that, having been accused of an offense, a right inhered in respondents to try the question out first in their paper with sundry reflections on the quality of the tribunal which assumed to entertain the charge. Of course, this defense begs the whole question. It would be just as good if the News-Bee had been sued for libel or its editor indicted by some grand jury. In either of these cases, by the same reasoning, the paper, in advance of the trial, would have the right to berate the other party, lampoon the grand jury, discuss the evidence and abuse the judge of the court. And, as respondents have no greater right to use their newspaper in their own behalf when under charges than in behalf of any other citizen, if their argument is good the paper and its publishers and editors are immune from punishment for any interference with a pending proceeding which they please to offer. If we have come to this pass, the courts may as well take permanent vacations and allow all litigable questions to be settled in editorial sanctums. Mr. Cochran said of this editorial that it was "primarily intended to make the people of Toledo understand that, no matter what happened to me, no matter what any court might do, that it was not going to change the policy of the News-Bee;" that it was written to let his readers know that it was not intended "to let any judge edit the News-Bee or lay down its editorial policy," that is to say, that the News-Bee will hold its chosen course in defiance of any court; as between the court's right to undisturbed consideration of issues before it and Mr. Cochran's "editorial policy," the latter has precedence under all circumstances. This is insolent egotism becoming rabid.

Instead of criticizing the publications, September 9, of the Socialist resolutions, condemning court interference with the Schreiber ordinance, and, September 11, of the proceedings of the Central Labor Union discussing impeachment if the city should lose the traction case, counsel suggest that respondents should be complimented, because that action operated to relieve these organizations of something which they should "get out of their systems," and that, by publication, at the end, "they could see what nonsense and foolishness it was." By precisely the same reasoning, everything respondents them-

selves said of the court and the suitors before it, however invidious or offensive, could be excused, because that behavior would be but a process of eructation—a relief from some disturbance of respondents' systems. This defense is more ingenious than impressive. If these utterances were not so clearly in line with respondents' own original attacks on the court respecting the case, they might be overlooked, perhaps, on the ground suggested. It has already been noticed that both the Socialists and the labor agitator received inspiration for their outbursts from respondents. There is some responsibility on those who administered the poison which disturbed these systems. As it is, the same editorial precaution which suggested editing the Socialist criticism had better have been exercised to their exclusion altogether if respondents would not bear responsibility for them as reflecting the paper's own views. One who gives currency to defamatory matter is himself liable (25 Cyc. 574; Olmstead v. Brown, 12 Barb. [N. Y.] 657), and newspapers cannot escape on the theory that they are entitled to print the news (25 Cyc. 405), although this court, in matters of contempt, at least, would not incline to apply this principle very rigidly, if the publications were free from the appearance that they served the paper's "editorial policy" of defamation. In this connection, it should be observed that what is considered reprehensible in the publication of the account of the Quinlivan matter, in the early edition of the News-Bee of September 12, appearing before the entry of the court's order in the traction case, is not the fact itself that the paper saw fit to print the news and the substance of the charges against Quinlivan, but that, in line with its policy to emphasize and give prominence to what it considers the impressive things in the items of news, respondents extracted from the news article the threatening and contemptuous language of Quinlivan and presented it with special typographical emphasis.

In our findings hereafter stated we omit some publications which counsel for the government insist are predicates for a charge of contempt. We pass them over principally to give respondents the benefit of every doubt. Unless a publication plainly tends to affect the administration of a pending case, our conception of section 268 requires that it be not considered a misbehavior, no matter how aggravating or unfair it may be. An extreme instance is the editorial of March 31. The motion for a temporary injunction was denied on March 30, with a written opinion, of which the News-Bee was furnished a copy and from which, in its issue of March 31, it published extracts; yet respondents unmistakably preverted the court's position in their editorial comment. That the court's position

and the paper's comment thereon may be more clearly considered together, we set out here in parallel a paragraph from the opinion and the editorial:

Opinion.	Editorial.
"That the company may run its cars from day to day without the city's consent and charge fare because its service is a public necessity,* * * but the city may at any time summarily deprive the company of the use of the streets except to salvage its property and the company may stop its cars at any time."	"To the layman it appears peculiar that the city cannot stop the company's cars because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights regardless of the needs of the people. Reminds us somehow of the elder Vanderbilt."

The subject in the opinion was but briefly considered, epitomizing the features of the court's unofficial statement in which, in more detail, it was declared:

"That the company can only operate after the expiration of its franchises at the city's sufferance, and its right to do so ends abruptly when the city acts through a new franchise or by imposing reasonable terms for a continued day by day use or other by means at the city's command."

This statement was published in full in the News-Bee March 26.

It follows, from these facts, that an only possible explanation for the editorial reflection on the court abides either in a willful oversight of the respondents' own files and documents coupled with an intention to belittle the tribunal, or in the employment of a willful perversion of the truth in a persistent intention to degrade the court. For it there can be no legitimate excuse. Strictly speaking, however, this unjustifiable comment cannot be said to tend to obstruct the administration of justice because it deals with a completed act of the court; wherefore it is within the favor of the decision in 131 Fed. (the Daniels case), which case, in our judgment. at the most decides no more than this. In the case before us, however, the publication has an important function as an illuminant of the respondents' attitude towards the court respecting the traction case generally to exhibit the animus inspiring prior and subsequent publications which the court finds to be contemptuous. Respondents recognize the difficulty of excusing or even explaining this editorial. They deny any intention to reflect on the court, but its cynical tone, aside from its reference to the elder Vanderbilt's well-advertised views of the public, belies the disclaimer. They acknowledge they had reference to the

court's opinion, but insist that they intended to refer at the same time to the claims put forth by the traction company. They say that, to the extent that it "does not correctly state the decision of the court, the error was unintentional." Unfortunately for their defense, the sneer at the court is based entirely on the misrepresentation, and its tenor harmonizes altogether with that of every other comment made respecting the case.

We agree entirely with the view of the court in Stuart v. People, 3 Scam. (Ill.) 395, which counsel for respondents are assiduous to call to our attention, to the effect that:

"An honest, independent, and intelligent court will win its way to public confidence, in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them by unnoticed, than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party."

This was said in a case where there was a specific finding of fact that the sole alleged offensive publication had no tendency to obstruct the administration of justice. We would, and in this case did, go further and say that a court ought not to be swift to notice newspaper quips or careless or even untruthful reporting of its proceedings, even if superficially they reflect upon it respecting a pending case. Much better should it overlook such matters and trust to the good sense of the community it serves to secure for it the respect to which it may be entitled. On this principle we might have left unconsidered some other publications for which respondents are now held, had they not been plainly respective parts of a series of offenses.

But a court may carry forbearance so far and depend so long upon the good sense of the public to protect it from the embarrassment of repeated and persistent attacks as to become contemptible for weakness. Especially would this point be reached when, as here, the attempt to undermine the court is made by appeal after appeal to the selfish interests of the public in the outcome of the case, in which the public is repeatedly told that it is the only party whose rights are entitled to a particle of respect. In this matter the record shows that the court endured the News-Bee's attacks upon suitors before it and upon the court itself, and carried all the embarrassment inevitable from these publications, for nearly six months before moving to vindidate its independence. If longer patience than that would have been a greater virtue, it surely would have been at the same time a weakness of public service.

The right to freely comment on judicial conduct is not involved in this case. Such a right is unquestioned; just as plain as the corollary that the courts have a right—the people have a right—to expect newspapers to fairly criticize the courts, to argue their criticisms from truthful, not false, premises. Under these fair and honorable circumstances, it is true, as Judge Taft said to the American Bar Association, of which counsel are at pains to remind us, that "the opportunity freely and publicly to criticize judicial action" is of vast importance, for one reason that:

"It is the only practicable and available instrument in the hands of a free people to keep * * * judges alive to the demands of those they serve."

One is unable to find, however, in this right, any excuse for hampering the administration of justice by unfair comment on the court and by stirring up hostile sentiment toward the court and suitors therein respecting a pending case.

There is another supreme public interest which the right to freely criticize judicial action is to serve, not to destroy, of which the court, in Cooper v. People, 13 Colo. 377, 22 Pac. 802 (31 L. R. A. 429), supra, speaks:

"Every citizen has a profound personal interest in the enforcement of the fundamental right to have justice administered by the courts, under the protection and forms of law, free from outside coercion or interference. It is doubtful if anything else can be mentioned of greater importance than this right to society and the state; and it is not too much to say that the responsibility of the journalist for its enforcement is, because of the vantage ground he occupies, second only to that of the judge."

The right to criticize judicial action, of which Judge Taft speaks, is the right to remind courts of their function to determine issues before them free from any external influences of any character, not a right by unjustifiable criticism and comment and palpable appeals to public passion to impose external influences upon the tribunal.

Without affecting the present case, we may adhere, also, to the views announced before a recent meeting of the American Bar Association, which counsel for respondents very carefully call to our attention, wherein the distinguished speaker said:

"May I not ask you gentlemen whether the time is not now ripe for the judges themselves to take greater pains to explain to the public the situation they now occupy; in some way * * * to let the public understand what is going on in the courts, the great purpose of the courts, the great objects to be attained?"

The suggestion is acceptable, truly, but to follow it courts must have an honest medium of communication with the people. Judges may write opinions and file them; thereafter they must trust to the press. That newspaper, however, which maltreats a court, as did the News-Bee of March 31, in founding upon a palpable misrepresentation of this court's traction opinion of March 30 a sneering reflection on the court's fairness, and whose headline custom yields so many false impressions as this record shows, is not a very promising medium for a judge's explanation to the people of the position the court occupies respecting a matter of public interest. In spite of appearances, we are certain that the sardonic humor in counsel's reminder of this address was unintentional.

We are unable to accept at its face value the claim in testimony, offered possibly in mitigation, that the offenses complained of were committed in a zealous, self-effacing effort to serve the people. There are not wanting in the atmosphere of this case grounds for suspecting that the boasted interest in the people was commercial, not unselfish and patriotic; that the "implied contract" to give the people all the news was violated in the publication of manifest untruths and unmistakable reflections on the court and parties before it, not in excessive zeal for the public welfare, but willfully to foster local prejudices, so that the resultant distrust of authority might be coined into dividends; that these equivocations and, at times, downright prevarications, were played as salient features, and cast in extravagant headlines and special boxings, to stimulate an interest which would increase circulation, give excuse for extra editions, and catch more pennies.

According to Mr. Cochran's testimony, four municipal elections were carried by candidates supported by the News-Bee and in line with its traction policies, and yet the power to settle the franchise question was never exercised; the issue was always on hand to be the subject for lurid rhetoric and violent invective. It is open to question whether, at least since 1910, with the state law protecting the people through a referendum, the News-Bee's city hall could not have brought the question to an answer. The city had the exhaustive report of its chosen expert, and the votes in council as shown by the passage of the Schreiber ordinance. It does not strain the imagination to see, in the "Big Con," the perennially unsettled traction question, and the vogue for three-cent fare, assets for respondent's business, whose value might greatly diminish, if not entirely vanish, if allowed to be coolly and dispassionately considered in a local court in plain view of an *undisturbed* community. The intelligence of those connected with the paper is too obvious to permit confidence that they entertain a genuine feeling that any interest the people had in the

solution of the question justified editorial conduct which had no other direction than to make it less and less easy for the people to see clearly just what their fair and reasonable interest was. They would not say, of course, that, no matter how cordially the "Big Con" was disliked or whatever the cause of the dislike, the honest people of Toledo desired anything else than fair treatment of it and from it. No one of an honest mind can reasonably deny that each publication in question directly tended to impassion those who relied on the News-Bee for impressions of men and events, and that thus such readers became measurably disqualified from judging what was fairly due either the city or the company, or whether the public's agents were faithful to their obligations.

Obviously, also, much of the testimony is shrewdly directed to a probable future claim that the court in this case aims to curtail the fredom of the press. Mr. Cochran's comments on the purpose of his "declaration of independence" leave no doubt here. Emphatically, a free press is an indispensable asset to liberty; but a licentious, unscrupulous press is a liability. Thomas Jefferson, while yet President, wrote to John Norvell that:

"It is a melancholy truth that a suppression of the press could not more completely deprive the nation of its benefits than is done by its abandoned prostitution to falsehood."

An unreliable newspaper is no friend of the people. Jefferson said of such that a man who never looks in one "is better informed than he who reads them, inasmuch as he who knows nothing is nearer the truth than he whose mind is filled with falsehood and errors."

The principle this court is applying here is not one which curtails in the slightest the liberty of respondents to publish anything they please, but it is the salutary doctrine, always recognized and indispensable to good order, that they must respond for a baleful use of that freedom. Robertson v. Baldwin, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. Nor is there in this case any assertion of a special power in the court over the press. A newspaper is merely a private affair, the activity of persons as amenable to the laws as individuals in other vocations, and the editors of newspapers—mere human beings, too—have no greater privileges than the writers of private letters or the circulators of common gossip. The power of a court over a newspaper is the same in quality, no greater and no less, as that affecting any other enterprise. A court is but a public agency—the people themselves in organization for a special purpose—to which newspapers are responsible when in the wrong, as any other human activity. The court, in People v. Stapleton, supra, say:

"Thoughtful citizens know very well that there is far more danger to our institutions, and far more danger to the rights of the people, and especially to the rights of litigants, to be apprehended from the power of the press over the courts than from the power of the court over the press."

The lynching of Johnson at Chattanooga, March 19, 1906, was preceded within four hours by an inflammatory article in a local newspaper under a "scarehead." As a result, officers of that city were before the Supreme Court and the whole community was in disgrace. United States vs. Shipp, 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041. Recently, Leo Frank's was a case also where apparently public hysteria, stimulated by hyperbolic newspaper discussion of the charge against him, supplanted due process of law and made the court holding his life in the balance a contemptible thing, a failure as the administrator of justice.

That Toledo should be disgraced, as other cities have been, by street car riots, on Saturday, March 27, was rendered impossible by the action of the traction company in allowing free rides. Whether rioting would otherwise have occurred is pure speculation. Members of the city council predicted it as early as the 23rd, and the News-Bee itself says there was "much anxiety" on the subject. It is entirely obvious that its own behavior on March 24, 25 and 26 gave reasonable occasion for anxiety, because it offered the greatest encouragement to those who were disposed to defy law and order to exercise their proclivity when the franchises expired.

As no sophistry avails with intelligent persons to argue out of these publications their tendency to arouse distruct and dislike of the court, so, equally, no sophistical declamation should be allowed to becloud the issue of this case. It is not to muzzle the press, to "edit the News-Bee", to create a "fear" of this court, or its judge, to prevent which Mr. Cochran says, in his testimony, was the purpose of his "declaration of independence," but to define and to insist on the right of this court to transact the business intrusted to it without molestation or the embarrassment of improper influences, whether newspaper suggestion, criticism, intimidation, or what. It is to assert "the right of every litigant to have his case heard free from baneful external influences sought to be executed from selfish or other improper motives."

This court is dealing here with "palpable acts of journalistic lawlessness, calculated to weaken the independence of the court and destroy confidence in its judgment. To justify them is to deny the supremacy of the law, and assert the doctrine of newspaper absolutism. To admit

that publishers may promote their interests in pending litigation by resorting to methods not available to others is to strike down our much-vaunted principle of "equality before the law," and to declare that journalists, who chose to become malefactors, are a privileged class and entitled as such to go unwhipped of justice. But the law recognizes no such distinction. It accords to publishers, says Chancellor Walworth, "no rights but such as are common to all. They have just the same rights as the rest of the community have, and no more." King v. Root, 4 Wend. (N. Y.) 113 [21 Am. Dec. 102]." State v. Bee Pub. Co., supra.

[5-7] It is urged that it is neither averred nor proven that any of the publications involved ever came to the attention of the judge of the court. In our judgment, this is nothing. The question is not, did the misbehavior embarrass the court or obstruct justice in either of the directions alleged, but whether they were calculated—tended—to such results. It is not what respondents actually accomplished, but what they intended and tried to do, for which they should be held. Attempts to commit crimes are themselves crimes. Besides, the order for an information, offered and received in evidence without objection, recites that each of the publications were seen by the judge as a daily reader of the News-Bee. In cases of this kind it is competent for the court to take judicial notice of pertinent facts which come within the cognizance of the judge's senses. Myers v. State, 46 Ohio St. 473, 492, 22 N. E. 43, 15 Am. St. Rep. 638.

Yet the record shows some obstruction of justice referable to respondents' conduct. In fear of the results of the encouragement to anarchy, of defiance to constituted authority, for Friday night, March 27, which the News-Bee had given in its issues for the three previous days, the traction company allowed free riding, to its great and unjustifiable loss, as clearly appeared when the city admitted the confiscatory character of the ordinance in whose behalf the News-Bee advertised the meeting in Memorial Hall, "restraining order or no restraining order." The situation, to which respondents' behavior undoubtedly contributed, impelled the court's special endeavors to allay public feeling and, to accommodate the public temper, caused it to delay the operation of a just order for three days. The proposition for unlawful action Friday night, which the News-Bee exploited March 25, brought additional work to the administrative officers of the court, of which the paper itself speaks.

After the events, it is safe speculation to say that all of these fears were needless, but at the time, as the paper admits, anxiety existed; whether foolish or not is beside the question.

However that feeling may be characterized, respondents' behavior was a prominent factor in its creation. We need not go beyond the articles from the News-Bee admitted in evidence in this case to learn that the court had its attention turned to some of these things to its annoyance when the issues in the case were under its consideration.

Counsel for respondents ask the court to consider it a virtue in respondents that, Friday, March 27, their paper printed a news article under the heading, "All Urge Peace in the Car Contest." This article has as one of its opening paragraphs this:

"With a crisis in Toledo's 12-year fight for three-cent fare only a few hours away and the people aroused as they seldom have been through the long years of struggling against the Big Con, all parties to the controversy—company, city and federal court—pleaded on Friday for no rioting or trouble after midnight, when the three-cent all day ordinance becomes effective."

This sentence has four propositions, only one of which makes for peace: There is a crisis after "long years of struggling;" the people are thoroughly aroused; although the court has to hear the question, the ordinance is effective nevertheless at midnight; all parties—three, two of whom have been the object of the News-Bee's attacks—plead for good order, same the News-Bee and those whom it essays to lead.

The paper merely states a matter of news, its "editorial policy" for the last three days is not changed. On the contrary, its cartoonist pictures the head of the city's safety department hastening out of town, thus giving point to the editorial assurance of the day before that the police will not "use their clubs on car riders who refuse to pay more than three-cent car fare after Friday," and Mr. Cochran breaks out in more two-column wide large type, editorial "punching," advising his followers that the Big Con is a "trespasser" which has "rushed into the federal court" to wrest control of the streets from the people; that its attitude is "the same old defiance of the people;" that its past conduct gives no assurance that it will live up to its promises; and that it operates for "the financial gain of foreign bondholders and stockholders."

Under these circumstances, the amount of credit due respondents for merely printing the news that others than the News-Bee "pleaded on Friday for no rioting or trouble" is not very large. The article is noticeable for proof that "the anxiety about trouble," of which the paper elsewhere speaks, had become somewhat general since Monday night, when councilmen first gave it voice. Mr. Cochran himself seems to have been affected, for he says in testimony:

"I asked the boys—I asked them: 'There is danger of any trouble here?' They said: 'Absolutely none, unless it may be a little scrap on the rear end of a street car.' "

Because of this showing, analysis is difficult of the state of mind which, in answer to his counsel's question as to ground for fearing violence, prompted him to answer: "I don't know where it came from, but it must have been in Judge Killits' imagination."

It is not a task on imagination to see the possibility of numerous scraps on back platforms with "the people aroused as they seldom have been through the long years of struggling," if the full Memorial Hall project, so extensively advertised and apparently indorsed by the News-Bee, had been carried out, and some hundreds of men, with Mr. Cochran's denunciations of "stock gamblers and speculators, trespassers, arrogant franchise manipulators," seeking a "strangle hold" in the courts on the people, and the impassioned oratory of 15 speakers, stirring their souls, had rushed the cars that night. An experienced newspaper man like Mr. Cochran knows something of the psychology of a mob, and knows, of course, that one "little scrap" would be an insignificant, casual, individual matter; but a score or more at the same time, and as the sequence of inflammatory appeals, and thus becoming action in concert, would amount to a riot. The publications in the News-Bee unquestionably tended to the production of just such a concert of action. From such a situation to destruction of property, and even loss of life, is but a step, as historical experience shows.

The Quinlivan incident also was thrust upon the court in direct sequence to respondents' misrepresentation, and, as we have hitherto suggested, the identity of language between the Socialist resolution, edited and published in the News-Bee on September 9th, and its own characterization of the "Big Con" as a suitor in this court, suggests that the Socialist insult to the court was inspired by respondents' conduct.

We take this occasion to reiterate former expressions of gratitude to counsel that they have apparently assisted this cause to proceed altogether as one affecting the court as an agency of the people, and not at all as a matter of private concern to the individual who, as a part of the court, happens to occupy the bench for the time being. It is power emanating from the Constitution and laws, and, consequently, derived from the people, which this court exercises; therefore, an insult to it, an attempt to belittle or degrade it or to thwart the exercise of its functions, is an affront to the people themselves and in no way a personal matter between the alleged offender and the judge. Our conception of section 268 of the Judicial

Code agrees thoroughly with that of counsel for respondents, to this extent, at least: Those who would degrade this case to the level of a mere personal controversy between the respondents and the judge of this court do so either through sheer ignorance or through a pitiable incapacity to understand how public service may be impersonally rendered, without which there can be no faithful performance of official functions, or because of willful perversion of facts plain to an honest and open mind. As far as possible, to emphasize the impersonality of this proceeding we have, to counsel's knowlelge, proceeded with utmost deliberation and accommodation to every convenience of respondents, and if in any place there is the slightest failure in respect to any interest of the respondents, it has not been due to any lack of scrupulous endeavor that nothing should be left undone to make a record complete as to any right they should have.

While, of course, after Mr. Cochran's testimony of his years of continued active interest in the News-Bee as its editor in chief, and his admission that for four years his paper had industriously chronicled the proceedings of this court, we may not accept as reliable his claim that in writing his editorial of March 26 he was merely indulging in reasonable speculation respecting the quality of the court as a factor yet unknown to him, he might, as far as we know, have truthfully said that nothing had theretofore transpired which had established an unfriendly relation between the latter and the News-Bee.

In this connection, it may be observed that all of the publications of the first count were uttered before the court had indicated any view which by the wildest imagination could be considered to be at odds with the News-Bee respecting the Schreiber ordinance or as to anything else connected with the traction case. The court was never called upon to decide the controversy that the measure was confiscatory, for that fact was admitted by the city, and its admission was not resolved into a court finding until after respondents had uttered all of their publications from March 24 to September 12, inclusive. We are bound therefore to consider that the offenses embraced in the first count were not inspired by any feeling against the judge of the court, but were wholly the fruits of a policy obsessing respondents, which would brook no interference with their self-appointed task to settle the traction question on terms entirely their own.

This court, however, has no right to allow an endeavor to be impersonal to enfeeble its judgment of the character of respondents' offenses, and, if therefore we seem to have indulged in strictures of characterization, it it because the crime of respondents is so clear, the tend-

ency of their acts so demoralizing to a state of society which, needing some organization for the settlement of its controversies, needs therewith confidence in its judicial tribunals, that there is no alternative but unequivocal condemnation.

Again, we are not helped to any soft words by any act of respondents since attention was called to their offenses. Mr. Cochran somewhat flippantly says, speaking of both tirades whose authorship he owns, that they were not occasions when he felt that his thoughts should be couched in "very nice, ladylike language," and the air of his entire testimony is that of one whose attitude toward the court and the question of its right to try the traction case free from the News-Bee's interference is still precisely that which formed the "editorial policy" responsible for any of the publications we have to consider. It is very plain that he justifies every outrage of his paper, is still under the obsession of an unweakened confidence in his editorial impecability, and, with difficulty, entertains a compassionate disdain for any one failling to accord to him, as his privilege, the right to speak the final word upon questions, even to advising the people what a court should or should not do and to what extent they should respect or obey its decrees. There is nothing apologetic in his manner or disposition. If he disclaims any intention to reflect on the court, it is not born of any thought that he may have overstepped, but seems to be the product of pity for the mind that sees in his acts anything to be criticized. We may also regard the witness Cochran as reflecting the present attitude toward the court of the corporation which still intrusts to him the responsibility of speaking for it, wherefore it would be idle for the court to employ mellow terms in discussing respondents' offenses.

We have made separate findings of fact adjudging respondents guilty on all three counts and for the publications of March 24, 25, 26, 27 and August 14, September 5, 9, 10, 11, 12, 14 and 17, and we come now to the difficult task of fixing an appropriate penalty. Congress has not seen fit to fix a maximum; but in the alternative of fine or imprisonment, punishment is left to the sound discretion of the court. The case before us is unique. The books do not afford another where the court, respecting a pending case, was subjected to a continual and prolonged bombardment as here. Many reported newspaper cases are extant, but the offenses were for single publications, or, at most, three or four; here there are a score and more.

In no other case was the court a target for months. Also, but one other case is reported (State v. Bee Pub. Co., supra) where, as here, a newspaper began on the court before the latter had taken any action at all, and in that Bee case there were not joined, as here, to attacks on the court, efforts to stir up popular opposition to the court's findings, nor was there misrepresentation of court proceedings. The rule is for the offense to follow some action by the court. For instance, in Myers' case an indictment had been found; in Patterson's, Tugwell's, and Rosewater's, respectively, the publications were inspired by partisan resentment at holdings by the court; but here the court had been absolutely voiceless in the subject-matter of the contempt when the News-Bee proceeded editorially to belittle its judge and gave inspiration to those who would defy it. Even after the first expression from the court had been in favor of the issue for which the News-Bee contended, its decision was misstated and the prevarication made the premise for a most deliberate and offensive slur. The incidents of the first count especially precede and disclose an intention to anticipate court action. In the language of another court, the publications "were directed solely to actions to be taken and conclusions arrived at in the future, and it was undertaken by this reprehensible method to prejudice the mind of the public and extort a particular decision in a case then pending for determination." It is notable that the publications under the second and third counts are substantially challenges to the court. The publications which we condemn are separately contempts, some of them aggravated, and in series they intensify the offensiveness of each other, until, in the aggregate and cumulating their tendency, they call for punishment for which no adequate precedent exists. In connection with the cold-blooded, uninvited character of respondents' course, a deliberate employment "of outlaw methods in attempting to control judicial action," we ought not lose sight of the fact that respondents are still recalcitrant, putting before the court a defense which affronts intelligence; for, where it is not puerile, as where jurisdiction to hear the traction case is denied, it is definitely unreasonable, in that it asks for a construction of respondents' language which contravenes all rules of interpretation and invites the court to concede to the press rights which would make it more than a "Fourth Estate" and would give it power to indirectly control one of the three approved departments of our government.

If there were no other publications for the court to consider than those of the midweek of March, an offense sufficiently serious to warrant a large fine would be present. March 24: The traction company is trying to "evade" its obligations by taking its case into the federal court, but the city solicitor will "protect" any individual who takes the law in his own hands nevertheless. March 25: The judge of the court is an uncertain quantity, liable to be unduly impressed by the "high-priced legal talent" sold to the "Big Con," and therefore to furnish the latter with a "strangle hold" on the people; but it is planned that the people shall board the cars in large numbers on Friday night after listening to 15 speakers in Memorial Hall, and by aid of "sinew" furnished by union labor compel the conductors to accept three-cent fares, "restraining order or no restraining order by the federal court." March 26: While the judge of this court is holding "in the balance the case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators," preparations are going forward for the mass meeting in Memorial Hall to be assisted by union labor, and the police will not "use their clubs on car riders who refuse to pay more than three-cent car fare" that night, because the law is "only what the people will back up." This is preaching, advocating, anarchy. No sophistery of argument, no ingenious theory that the people of this city were interested in the case in the manner of "stockholders of a large corporation" entitled to receive reports of their business, suffice to gloss over the seriousness of this sort of thing, and it would be no less anarchistic if jurisdiction in this court to hear the traction case were palpably, unequivocally absent. These are not merely the result of reportorial inefficiency and enthusiasm, for the editor in chief, himself, gave them some personal attention.

For these reasons, a sound discretion calls for the imposition of a substantial fine upon the respondent corporation, and thus in some measure cause to be returned to the public part of the profits made from a circulation stimulated by appeals to selfish individual interests and by encouraging distrust of the faithfulness of public agencies.

The respondent Cochran is also specifically found guilty of criminal contempt, as charged in the information; but, after all, we must consider him as an employe of the real offender, merely an instrument—willing, it is true—of its unlawful conduct, not a principal. In one of his screeds he had something

to say of lawyers who sell themselves to the highest bidder. We doubt whether he who sells a facile pen to a corporation that the latter, from the prostitution of his ability, may prosper through exciting prejudices against the country's institutions, is qualified to cavil on this subject. If he were a principal instead of a mere employe, or were this a second offense, the court's duty to send him to a jail or workhouse might well be exercised; but here, we think, justice will be secured by making the Toledo Newspaper Company bear the substantial responsibility for the acts of those whom it hires, and by imposing on the servant, Cochran, in this, his first offense toward this court, at least, a fine in a nominal amount, that he may have a final judgment from which to prosecute review.

The Supreme Court, in Re Chiles, 22 Wall. (86 U. S.) 157, 169 (22 L. Ed. 819), has held, under the statute upon contempts which we apply, that, in cases where the end sought is to vindicate the court's authority, the court must judge for itself the nature and the extent of the punishment with reference to the gravity of the offense. A corporation can be punished only by a fine. The gravity of the offense is certain; there can be no graver public crime than to attempt, in the manner here, to extort from a court a particular decision, or to work to poison the minds of citizens against the only organization which society has yet been able to devise for the settlement of its controversies. The assumed failures of courts to do "substantial and not technical justice" are not to be prevented by attempting to make them subservient to gusts of popular passion, or, through falsely reporting their proceedings, distorting the facts before them for determination and lampooning unpopular suitors, by encouraging a mob spirit toward them.

The discretion which abides in a court to determine what amount of fine will be proper punishment in a given case involves an effort in ascertaining what sum will actually work a penalty under all the circumstances, including the financial condition of the offender; for it is obvious that a small amount might be a greater burden on one offender than many times that sum to another. The consideration here is to vindicate the court's independence by the imposition of a fine that will mark the importance of the issue as well as to punish. If we could feel that respondents were satisfied of the court's right to exact respect from them in the premises, and hence that they were finding in the court's condemnation alone some measure of punishment, the disposition would be to make that fact compensate for a large part of an otherwise proper fine. But this case closes with a feeling that they are as obdurate as ever, have learned nothing since their last publication, and

may refrain in future from repeating their offenses only because of probable consequences, and not through a sense of justice to the court.

It is a matter of common knowledge in this community that the respondent corporation is exceedingly prosperous, which fact is also indicated by its statements under the act of August 24, 1912. The financial condition of one under conviction may be looked into, that the court may be advised of what would be a punitive fine, and be enabled to exercise an intelligent discretion. Under the decisions in Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, and Wilson vs. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, we may require the corporation to produce its books in an inquiry. We hesitate, however, to exercise this inquisitorial power here, and prefer to act definitely in the light the court already has. It is, accordingly, adjudged that the respondent the Toledo Newspaper Company pay a fine of $7,500 and the costs of this proceeding. A writ of execution is awarded, but the same is stayed until March 15, 1915. On or before that time the respondent corporation may apply to the court for a modification of this sentence, on the ground that it is excessive considering the present financial condition of the corporation and the rate per cent. of its profits on its investment during the months of March to September, inclusive, of 1914. After an inquiry in this behalf, had on such application, a modification of sentence will be made as the facts then exhibited justify. The respondent Cochran is fined $200, and he is ordered to stand committed to the jail of Lucas county, Ohio, until this fine is paid. Execution of the order of commitment is suspended until April 15, 1915, to enable him to perfect a record for a review of the judgment against him, at which time, if proceedings in error have been begun, a further suspension pending review will be granted. Execution of judgment against respondent corporation will also be granted pending proceedings for review, whether the sentence is modified on its application or not.

Note.—Since both the opinion and order in this case were written, we have noted a press report of a decision by the judge of a state court affirming the constitutionality of section 11343—2, General Code of Ohio (Act of April 26, 1911, p. 95), providing that the publication of "a fair and impartial" report of certain court proceedings and documents filed therein shall be privileged under certain circumstances. Whether that act does or does not control this court in a case of this character, we have given it application in this case, as will be noted where the opinion deals with the publication by the respondents, September 12, 1914, of the charges against Quinlivan.

MOTION OF THE DEFENDANT, THE TOLEDO NEWSPAPER COMPANY FOR A NEW TRIAL.

(Filed Jany. 23, 1915.)

Defendant, The Toledo Newspaper Company, moves the court to set aside its findings and judgment and to discharge it or to grant it a new trial upon the following grounds:

1. Because said finding and judgment against it on the first count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

2. Because said finding and judgment against it on the second count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

3. Because said finding and judgment against it on the third count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

4. Because the court erred in excluding evidence offered by the defendant.

5. Because the court erred in admitting evidence on behalf of the government over objection and exception of the defendant.

6. Because of other errors of law occuring at the trial excepted to by the defendant.

7. That the fine imposed upon this defendant is excessive.

Lawrence Maxwell,
Jay W. Curts,
Kohn, Northup, Ritter & McMahon,
Counsel for Said Defendant

MODIFICATION OF THE MOTION FOR A NEW TRIAL BY DEFENDANT, THE TOLEDO NEWSPAPER COMPANY.

(Filed March 29, 1915.)

The defendant, The Toledo Newspaper Company, hereby withdraws from its motion for a new trial heretofore filed in this cause, the seventh ground therein set forth, to-wit, that the fine imposed upon this defendant is excessive.

Lawrence Maxwell,
Chas. Northup,
J. W. Curts,
Attorneys for Defendant.

MOTION OF THE DEFENDANT, NEGLEY D. COCHRAN, FOR A NEW TRIAL.

(Filed Jany. 23, 1915.)

Defendant, Negley D. Cochran, moves the court to set aside its findings and judgment and to discharge him or to grant him a new trial upon the following grounds:

1. Because said finding and judgment against him on the first count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

2. Because said finding and judgment against him on the second count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

3. Because said finding and judgment against him on the third count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

4. Because the court erred in excluding evidence offered by the defendant.

5. Because the court erred in admitting evidence on behalf of the government over objections and exceptions of the defendant.

6. Because of other errors of law occurring at the trial excepted to by the defendant.

Lawrence Maxwell,
Jay W. Curts,
Kohn, Northup, Ritter & McMahon,
Counsel for said Defendant.

MOTION OF THE DEFENDANT, THE TOLEDO NEWSPAPER COMPANY, IN ARREST OF JUDGMENT.

(Filed Jany. 23, 1915.)

The defendant The Toledo Newspaper Company, moves the court to arrest judgment as to it on the first count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Said defendant moves the court to arrest judgment as to it on the second count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Said defendant moves the court to arrest judgment as to it on the third count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Lawrence Maxwell,
Jay W. Curts,
Kohn, Northup, Ritter & McMahon,
Counsel for said Defendant.

MOTION OF THE DEFENDANT, NEGLEY D. COCHRAN, IN ARREST OF JUDGMENT.

(Filed Jany. 23, 1915.)

The defendant, Negley D. Cochran, moves the court to arrest judgment as to him on the first count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Said defendant moves the court to arrest judgment as to him on the second count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Said defendant moves the court to arrest judgment as to him on the third count of the information upon the following grounds:

1. Because the matters and things set forth and charged do not constitute misbehavior on the part of this defendant so near the presence of the court as to obstruct the administration of justice.

2. Because the court is without jurisdiction in this proceeding to punish the defendant because of the matters set forth in said count.

Lawrence Maxwell,
Jay W. Curts,
Kohn, Northup, Ritter & McMahon,
Counsel for said Defendant.

ORDER OVERRULING MOTIONS FOR NEW TRIAL.

(Entered by Judge Killits, March 29, 1915.)

On this 29th day of March, 1915, this cause came on to be heard on the motion of the said defendant The Toledo Newspaper Company for a new trial of said cause as to it, as said motion was amended by withdrawal of the seventh count thereof, and was submitted to the court; on consideration whereof it is ordered that said motion be and the same hereby is overruled, to which action of the court in overruling said motion for a new trial the said defendant, The Toledo Newspaper Company, by its counsel duly excepts.

And thereupon this cause came on further to be heard on the motion of the said defendant Negley D. Cochran for a new trial of said cause as to him the said Cochran, and was submitted to the court: on consideration whereof it is ordered that said motion of the said Cochran be and the same hereby is overruled, to which action of the court in overruling said last mentioned motion the said defendant, Negley D. Cochran, by his counsel duly excepts.

And thereupon this cause came on further to be heard on the motion of the said defendant The Toledo Newspaper Company for an order arresting the judgment herein as against it, and was submitted to the court; on consideration whereof, it is ordered that said last mentioned motion be and the same hereby is overruled, to which action of the court in overruling said last mentioned motion the said defendant, The Toledo Newspaper Company, by its counsel, duly excepts.

And thereupon this cause came on further to be heard on the motion of the said defendant Negley D. Cochran for an order arresting the judgment herein as against him, the said Cochran, and was submitted to the court; on consideration whereof it is ordered that said last mentioned motion be and the same hereby is overruled, to which action of the court in overruling said last mentioned motion of the said defendant Negley D. Cochran, the said defendant Negley D. Cochran, by his counsel, duly excepts.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

(Filed March 31, 1915.)

Each of the defendants, The Toledo Newspaper Company, a corporation, and Negley D. Cochran, assigns as prejudicial error in the record, proceedings, judgment, and sentence of the court in the above entitled cause, that the court erred:

1. In overruling the demurrer of said defendant to the first count of the information, which demurrer should have been sustained upon each of the grounds set forth therein.

2. In overruling the demurrer of said defendant to the second count of the information, which demurrer should have been sustained upon each of the grounds set forth therein.

3. In overruling the demurrer of said defendant to the third count of the information, which demurrer should have been sustained upon each of the grounds set forth therein.

4. In overruling the demurrer of said defendant to the entire information, which demurrer should have been sustained upon each of the grounds set forth therein.

5. In overruling the motion made by said defendant at the close of the evidence, to dismiss the first specification of the first count of the information.

6. In overruling the motion made by said defendant at the close of the evidence, to dismiss the second specification of the first count of the information.

7. In overruling the motion made by said defendant at the close of the evidence, to dismiss the third specification of the first count of the information.

8. In overruling the motion made by said defendant at the close of the evidence, to dismiss the fourth specification of the first count of the information.

9. In overruling the motion made by said defendant at the close of the evidence, to dismiss the fifth specification of the first count of the information.

10. In overruling the motion made by said defendant at the close of the evidence, to dismiss the sixth specification of the first count of the information.

11. In overruling the motion made by said defendant at the close of the evidence, to dismiss the seventh specification of the first count of the information.

12. In overruling the motion made by said defendant at the close of the evidence, to dismiss the eighth specification of the first count of the information.

13. In overruling the motion made by said defendant at the close of the evidence, to dismiss the ninth specification of the first count of the information.

14. In overruling the motion made by said defendant at the close of the evidence, to dismiss the tenth specification of the first count of the information.

15. In overruling the motion made by said defendant at the close of the evidence, to dismiss the eleventh specification of the first count of the information.

16. In overruling the motion made by said defendant at the close of the evidence, to dismiss the twelfth specification of the first count of the information.

17. In overruling the motion made by said defendant at the close of the evidence, to dismiss the thirteenth specification of the first count of the information.

18. In overruling the motion made by said defendant at the close of the evidence, to dismiss the fourteenth specification of the first count of the information.

19. In overruling the motion made by said defendant at the close of the evidence, to dismiss the fifteenth specification of the first count of the information.

20. In overruling the motion made by said defendant at the close of the evidence, to dismiss the first count of the information.

21. In overruling the motion made by said defendant at the close of the evidence, to dismiss the first specification of the second count of the information.

22. In overruling the motion made by said defendant at the close of the evidence, to dismiss the second specification of the second count of the information.

23. In overruling the motion made by said defendant at the close of the evidence, to dismiss the third specification of the second count of the information.

24. In overruling the motion made by said defendant at the close of the evidence, to dismiss the second count of the information.

25. In overruling the motion made by said defendant at the close of the evidence, to dismiss the third count of the information.

26. In entering final judgment in said case against said defendant.

27. In overruling the motion of said defendant to set aside the findings and judgment and to discharge said defendant or to grant a new trial, which motion should have been sustained.

Because said finding and judgment on the first count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

Because said finding and judgment on the second count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

Because said finding and judgment on the third count of the information is not sustained by sufficient evidence and is contrary to the law and the evidence.

28. In overruling the motion of said defendant to arrest judgment on the first count of the information, which motion should have been granted on each of the grounds set forth therein.

29. In overruling the motion of said defendant to arrest judgment on the second count of the information, which motion should have been granted on each of the grounds set forth therein.

30. In overruling the motion of said defendant to arrest judgment on the third count of the information, which motion should have been granted on each of the grounds set forth therein.

Wherefore, said defendant, The Toledo Newspaper Company, prays that the judgment of the District Court against it may be reversed, and the defendant, Negley D. Cochran, prays that the judgment of the District Court against him may be reversed.

Lawrence Maxwell,
Charles S. Northup,
Jay W. Curts,
Counsel for the Defendants.

PETITION FOR WRIT OF ERROR TO REVIEW PROCEEDINGS FOR ALLEGED CONTEMPT.

(Filed March 31, 1915.)

To the District Court of the United States for the Northern District of Ohio, Western Division.

Each of the defendants, The Toledo Newspaper Company, an Ohio corporation, and Negley D. Cochran, prays for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment entered and sentence pronounced against said defendant, and files herewith an assignment of errors and prays that the writ of error shall operate as a supersedeas, and that execution be suspended pending the determination of proceedings on said writ of error.

Lawrence Maxwell,
Charles S. Northup,
Jay W. Curts,
Attorneys for Petitioners.

ORDER ALLOWING WRIT OF ERROR.

(Entered March 31, 1915, by Judge Killits.)

This 31st day of March, A. D. 1915, came the defendants, The Toledo Newspaper Company, a corporation, and Negley D. Cochran, by their attorneys, and filed herein and presented to the court their petition, praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, to operate as a supersedeas, and filed therewith their assignments of error.

On consideration whereof the court allows and signs a writ of error as prayed for to operate as a supersedeas, upon the defendant, The Toledo Newspaper Company, giving a supersedeas bond in the sum of $7,700.00, and the defendant, Negley D. Cochran, giving a supersedeas bond in the sum of $300.00, conditioned according to law, and to be approved by the clerk of this court.

WRIT OF ERROR.
(Filed March 31, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.
United States of America, Sixth Judicial Circuit, ss:

The President of the United States,—To the Honorable, the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and The Toledo Newspaper Company, a corporation, and Negley D. Cochran, defendants, a manifest error hath happened, to the great damage of the said The Toledo Newspaper Company, a corporation, and said other defendant, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 30th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 31st day of March, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

(Seal.) B. C. Miller,
Clerk of the District Court of the United States,
for the Northern District of Ohio.
By J. W. Wilson, Deputy.

Allowed by
John M. Killits,
Judge U. S. District Court,
Northern District of Ohio.

CITATION.

United States Circuit Court of Appeals for the Sixth Circuit.
United States of America, Sixth Judicial Circuit, ss:

To the United States of America, Greeting. You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the 30th day of April next, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, wherein The Toledo Newspaper Company, a corporation, and Negley D. Cochran are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 31st day of March, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

John M. Killits,
Judge of the District Court of the United States
for the Northern District of Ohio.

Service of the within citation is hereby waived and appearance entered herein, this 31st day of March, A. D. 1915.

E. S. Wertz,
United States Attorney, Northern District of Ohio.

BOND ON WRIT OF ERROR.
(Filed March 31, 1915.)

Know All Men by These Presents: That we, The Toledo Newspaper Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of Seven Thousand and Seven Hundred Dollars ($7,700.00) to be paid to said United States of America; to which payment well and truly to be made, we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of March, A. D. 1915.

Whereas, lately at a District Court of the United States for the Northern District of Ohio, Western Division, in a suit depending in said court between the United States of America, plaintiff, and The Toledo Newspaper Company, a corporation, and Negley D. Cochran, defendants, a sentence and judgment was rendered against said The Toledo Newspaper Company, and said The Toledo Newspaper Company and Negley D. Cochran having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment and sentence in the aforesaid suit and a citation directed to said United States of America citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati in said Circuit on the 30th day of April next.

Now, the condition of the above obligation is such that if the said The Toledo Newspaper Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

The Toledo Newspaper Company (Seal.)
By Edward B. Conliss,
Vice Pres. & Bus. Mgr.
Rudolph C. Frey,
(Seal.) United States Fidelity & Guaranty Co.,
Its Attorney in Fact.

Signed and Delivered in the Presence of:
Marguerite E. Conaty,
Norman F. Nagelbrecher.

Approved:
John M. Killits,
District Judge.

BOND ON WRIT OF ERROR.

(Filed March 31, 1915.)

Know All Men by These Presents: That we, Negley D. Cochran, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars ($300.00) to be paid to said United States of America; to which payment well and truly to be made, we bind ourselves, and our administrators, executors, heirs and successors, jointly and severally, by these presents.

Sealed with our seal and dated this 31st day of March, A. D. 1915.

Whereas, Lately at a District Court of the United States for the Northern District of Ohio, Western Division, in a suit depending in said court between the United States of America, plaintiff, and The Toledo Newspaper Company, a corporation, and Negley D. Cochran, defendants, a sentence and judgment was rendered against the said Negley D. Cochran and the said The Toledo Newspaper Company, and the said Negley D. Cochran having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to said United States of America citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati in said Circuit on the 30th day of April next.

Now, the condition of the above obligation is such that if the said Negley D. Cochran shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Negley D. Cochran,
By C. S. Northup, his Attorney.
(Seal.) United States Filedity & Guaranty Co.,
Rudolph C. Frey,
Its Attorney in Fact.

Signed and Delivered in the Presence of:
Norman F. Nagelbrecher.
Marguerite E. Conaty.
Rud. C. Frey.
Approved:
John M. Killits,
District Judge.

ORDER EXTENDING TIME FOR MAKING RETURN TO WRIT OF ERROR.

(Entered April 22, 1915, by Judge Killits.)

Upon the application of the defendants, The Toledo Newspaper Company and Negley D. Cochran, and for good cause shown, it is hereby ordered that the time for making return to the writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, heretofore allowed herein, be, and the same is, hereby extended to May 29th, 1915, with leave to apply for further extension for good cause.

ORDER EXTENDING TIME FOR SETTLEMENT OF BILL OF EXCEPTIONS.

(Entered April 26, 1915, by Judge Killits.)

The defendants herein having presented to opposite counsel and to the court their bill of exceptions herein, on motion of said defendants, and for good cause shown, it is ordered that the time for the signing, sealing, allowance and filing of said bill of exceptions be and the same hereby is extended on this 26th day of April, 1915, to and including the 26th day of May, A. D. 1915.

ORDER SETTLING BILL OF EXCEPTIONS.

(Entered May 5, 1915, by Judge Killits.)

The defendants in the above cause having presented to opposite counsel and to the court at the last preceding term of this court, their bill of exceptions in this case, and requested the court to sign, seal and allow the same, and to order same to be placed on file, and to make it a part of the record herein, and the court having, during said last term of this court, extended the time for the signing, sealing, allowance and filing of said bill of exceptions, to and including the 26th day of May, 1915, the court upon due consideration of said bill of exceptions finds that the same is a true bill of all of the exceptions taken upon the trial of said cause, and the same is therefore signed, sealed and allowed by the court on this 5th day of May, 1915, and ordered to be placed on file, and it is hereby made a part of the record in this cause.

BILL OF EXCEPTIONS.

(Filed May 5, 1915.)

Appearances:

For the Government, U. G. Denman, Esq., District Attorney; John S. Pratt, Esq., Assistant District Attorney, and William L. Day, Esq.

For the Defendants, Lawrence Maxwell, Esq., Jay W. Curts, Esq., and Chas. S. Northup, Esq.

Be it remembered that on the trial of the above entitled cause in this court, begun at the October Term, 1914, before the Honorable John M. Killits, District Judge, presiding, the following proceedings were had December 28th, 1914, to-wit:

The United States offered in evidence the order issued by the court in this case #1535, dated September 29th, 1914, for an information in contempt, whereupon the same was admitted in evidence and a copy thereof is attached hereto marked "Plaintiff's Exhibit #1."

The Government offered in evidence, in chronological order, all the pleadings, motions, orders and opinions and a copy of the appearance docket in the case of Doherty & Co. vs. The Toledo Railways & Light Company, being Equity Case #86 in this court, and which papers were admitted in evidence and copies thereof are attached hereto marked "Plaintiff's Exhibit #2," each separate paper being also marked by way of designation with a letter of the alphabet.

Whereupon it was stipulated between counsel for the Government and counsel for the defendants that the motion for the appointment of a receiver in the case of Doherty & Co. vs. The Toledo Railways & Light Company was never presented to the court.

Newspaper copies of the headlines and cartoons, editorial and news articles set forth in the several specifications and counts of the indictment are attached hereto and made part hereof as exhibits, except the newspaper copy of The News-Bee of March 28, 1914, referred to in specification 7 of the first count. By stipulation, a photographic copy of the cartoon in said newspaper, and the adjoining headlines and a typewritten copy of the reading matter are hereto attached and made part hereof, marked "Plaintiff's Exhibit #3."

United States called as a witness,

HARRY J. HOWARD,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Denman:

I am the Managing Editor of The News-Bee, which is published by The Toledo Newspaper Company. The News-Bee dated September 17, 1914, containing the articles set forth in the third count, was issued in the sporting edition, the night edition, the home edition, the state edition, noon edition and the morning edition, making six editions in all. The editorial on the first page under the heading, "The News-Bee and Judge Killits" was published in the noon edition and in each edition following, making five editions altogether.

United States called as a witness,

J. W. WILSON,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Denman:

I am the deputy of the United States District Court Clerk in this Division. In that capacity, I have charge of the files of the various cases of the court filed here. I have charge of

the various papers, journal entries, etc., filed in Equity Case #86. I remember the entry of March 24th, 1914, which was a part of the Government's Exhibit #2, which was entered on motion of the plaintiff in Equity Case #86 to make the City of Toledo a party in that case. The motion was presented at the clerk's office and filed on the morning of March 24th, 1914, by counsel of the plaintiff in that case. I have the original order presented by the plaintiff. This (showing a paper) is the original order. It is dated March 24, 1914. When the motion was filed, Judge Killits was holding court in Cleveland and I called him on the long distance phone, reading the order to him, which he approved. I then took the original order, endorsed on it, "Entered March 24th, 1914," and entered it of record, sending the original order to Judge Killits at Cleveland, under special delivery stamp, for his signature. I don't remember absolutely the time of day. My recollection is that it was before noon that it came in. The letter going to Judge Killits at Cleveland was addressed to Hon. John M. Killits, U. S. District Court, Cleveland. It may have had some particular address in Cleveland. When I called the Judge on the telephone as to what to do with the order, he directed me to enter it and file the amendment and supplement to the bill and to send the order to him at Cleveland to be signed. I received the order back the next day signed by Judge Killits. The words "Entered March 24, 1914" were placed there at the time the order was received by me and entered on the order book. That was done on the 24th following the court's instructions to enter. I know Judge Killits' signature, and the signature on the order is his signature. My recollection is that I got the letter back on the morning mail on the 25th.

CROSS EXAMINATION

By Mr. Maxwell:

The paper which I have produced was the paper which was handed me by counsel for the plaintiff. I think it was Mr. Thomas H. Tracy. I read the paper to Judge Killits over the telephone and he told me to enter it and I did enter it. I sent the original paper to Judge Killits for his signature. That was after I had entered it. I am not sure, but I think it was after the motion and amendment were filed. I entered it on the chancery order book as an entry made at chambers. I am not sure that there was any other counsel present at the time counsel for the plaintiff presented this motion and draft of order. Mr. Rathburn Fuller may have been there. The City Solicitor was not there.

Thereupon the Government rested.

Thereupon counsel for each of the defendants moved the court to dismiss the information against them on the ground that no case had been established within the jurisdiction of this court. The motion was overruled and each of the defendants excepted.

The defendants, to maintain the issues on their part, then called as a witness,

J. W. WILSON,

who, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curts:

I am the Clerk of Court who just testified in behalf of the Government. I do not recall the date but I remember the fact that I received a statement sent to me by Judge Killits from Cleveland regarding the litigation between the traction company and the city. I do not have here a copy of the statement that was sent me. There is some other correspondence. I was just trying to locate a letter.

It was agreed by counsel for the Government that the statement of the court as printed in The News-Bee of March 26, 1914, was a correct copy of the statement sent by the court to Mr. Wilson.

The witness further testified: I gave a copy of this statement by Judge Killits to The News-Bee for publication, and I gave a similar copy to the Blade and to the Times. I did this by Judge Killits' direction.

The defendants called as a witness,

HARRY J. HOWARD,

who, beng duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curts:

My name is Harry J. Howard. I am Managing Editor of The News-Bee. I have held that position for eleven years. I was not with The News-Bee before that time. I was in the newspaper business for fourteen years before I was with The News-Bee. I have been in the newspaper business in this city since 1891. The statement in the article in The News-Bee of March 24th, 1914, under the headline, "Big Con Fights 3¢ Fare in Federal Court and May Ask Injunction Against Schreiber Ordinance," to the effect that Thurstin will defend anyone who would not pay, appears four times in the headlines and other parts of the article. It first appears in the story writ-

ten by the reporter or reporters; it appears next in what newspaper men refer to as the "box," or, in other words, the digest of the salient features of the news article, the purpose of which is to give the reader who may not be sufficiently interested in the particular news article, an opportunity by scanning the box, to get the salient features of the news article that follows. The next allusion to that particular statement occurs in the headline, so that we had the thing going in reverse order, and the purpose of the headline, of course, is to give the reader a general idea of what the story that follows purports to tell him.

The Court:

So that from the standpoint of The News-Bee on that occasion, this so-called position of the city solicitor was the salient feature of the story?

Witness:

We regard it as the salient news feature.

The witness further testified: The Thurstin referred to was the City Solicitor. The paragraph, "Holding court over the telephone is a new one but it seems to be a highly satisfactory method of doing business," referred to the statement made in previously published news articles, possibly of that date or possibly of the previous day, to the effect that Clerk Wilson called up Judge Killits over the phone and read to him a motion that the city be made a party to this action of The Railways & Light Company, and that the motion or order had been approved by the court to the extent that he had told the clerk to enter it. We mentioned the matter in this paragraph because it seemed to us that that appeared to be the turning point, or rather, a crisis in the street railway situation, and we desired to, in a measure, call attention to that particular dilemma in which the city appeared to be. I learned that the order had been granted over the telephone through information given the City Editor by Mr. Skeldon who reported that he had got his original information from Mr. Tracy to the effect that the motion had been read over the phone to Judge Killits at Cleveland and that the clerk had been told to enter the order as if it was entered by the court; and Mr. Skeldon also made the basis of his news report the fact that he had confirmed his information through Mr. Wilson, the clerk of the court. We printed the statement that Mr. Wilson brought over to us as coming from Judge Killits. We printed it accurately. I think that was on March 26th.

Counsel shows witness a copy of The News-Bee of March 26th, 1914, and the witness testifies: That is the statement Mr. Wilson brought to The News-Bee. The basic idea of the cartoon complained of in the sixth paragraph of the Informa-

tion, and which appeared in the paper of March 27th, 1914, entitled, "As We Lose Kapp We Get Lapp," first of all was that the similiarity of sound in the two names suggested a pictorial representation of the fact that the City Safety Director, carrying out the intention which he had announced some time previously of inspecting motor fire apparatus, had left that day or the day previous for Philadelphia, and that U. S. Marshal Lapp, as we were told, on the authority of the United States Court, was coming to Toledo to assume charge of the situation for a few days. The legend on the grip which Mr. Lapp is pictured as carrying, reading, "Order from Judge Killits," referred to the same news fact that was in possession of The News-Bee through Mr. Skeldon and Mr. LeBlond, our reporters, as expressed to them by Judge Killits in his room at the Hollenden Hotel in Cleveland on the morning of this day, I think it was. Mr. Skeldon reported to me that in his presence and that of Mr. LeBlond, the court had told the two reporters, who were there specially to secure from the Judge what the latest development was in the street railway situation, so far as it affected the United States Court, that it was the court's intention to send Mr. Lapp over here to take charge of the situation for, as I recall it, two or three days. The words. "Order of Judge Killits" referred to that situation. I did not draw the cartoon. I think I suggested some points about it. Just what they were I do not recall. I saw it before it was printed and passed upon it.

The witness further testified: The occasion for the cartoon in the issue of March 28th, representing the door or entrance of a street car and entitled, "Doherty, The Man Who Put The Con in Conductor," was that on the previous day the mayor had announced his intention to board one or more street cars shortly after midnight and to make a personal test of the question as to whether or not the conductors would accept three cent fares or would possibly eject him from the car, and because of that fact, reported to me by Mr. DeWolf, we assigned Mr. DeWolf and Mr. Skeldon to follow the mayor and to report what transpired as the result of that intention. Mr. DeWolf followed the mayor and saw him on at least two occasions proffer three coppers to a street car conductor, or pretend to offer three cents to a street car conductor. I am testifying to what was printed in The News-Bee of this particular incident. Mr. DeWolf, a reporter, told me that the mayor had attempted to offer a conductor or two conductors, three coppers in payment of his fare, at midnight after March 27th; that Henry L. Doherty, having previously moved out to the residence district in an automobile in advance of the mayor, had boarded the car before the mayor could get on, and pre-

vented the conductor from accepting the three pennies, and stated to the conductor, "You cannot take that man's money. He is my guest tonight," or words to that effect, and that incident was made the basis of the cartoon, or what we might call a pictorial representation of that particular news fact. It was reported to me that the incident occurred more than once that evening. The story of what happened appears in the same edition as the cartoon on another page. The title of the cartoon, "Doherty, The Man Who Put The Con in Conductor" was a pleasantry suggested to the editor who was responsible for the headline in that cartoon, as the result of Mr. Doherty's suave and persuasive way of apparently evading something that the city was trying to impose upon him. The word "Con" has no specific meaning, except as related to the conductor. Doherty was one of the plaintiffs in the pending case here. He is the Henry L. Doherty who figures in the traction matters here. The cartoon had no reference at all that can recollect to anything that occurred in this court or might occur in this court. We printed the opinion that Judge Killits filed in this court March 30th, in the Doherty case in full as well as a digest of it. We printed the opinion in full on the day following its delivery, I think. I think that the hour was so late that we were not able to print it in full in the home edition of that particular date, but it was printed in full I think on April 1st. I did not print all of the resolution adopted by the Socialists and referred to in the report appearing in Paragraph 12 of the Information under the heading, "Socialists Call Big Con Trespasser." The rest of the resolution had reference to proeeedings in this court in the Doherty case, as I recall it. I received the communication referred to in Paragraph 3 of Count 2, which is a letter from Paul G. Dennie, but the communication was not published in the form in which Mr. Dennie wrote it.

Counsel for defendants handed witness a paper marked "Defendants' Exhibit #1." The witness stated that that was the copy which he received from Mr. Dennie. The witness further testified: That is the original letter which I got from him. Mr. Dennie, whom I had known for some years, came into the office, accompanied by some other men whom I do not recall at this time, and he sat down at the desk of the sporting editor which ajoins mine, and took a sheet of copy paper off of the sporting editor's pad, put it into the typewriter and started to write something; and when he got through, he turned around and handed it to me. I did not know at the time, that is, before he sat down, what he was going to do; that is, what he was writing, and I did not know what was in the communication until he handed it to me. I glanced over it a second time carefully and then made the revisions that appear

here, and I said to Denny, "If you will stand for the publication of this in this form, I will use it but otherwise, no." My recollection is that I made changes in the copy which Mr. Dennie handed me because they were improper comments on the particular case before the court. That I think in a general way was in my mind, although I am not absolutely sure of that.

Mr. Curts:

We do not offer this in evidence.

Judge Day:

You had it marked for identification.

Mr. Curts:

I had it marked for identification only. We do not offer it in evidence.

CROSS EXAMINATION

By Mr. Day:

I am the Managing Editor of The News-Bee. Mr. Cochran is the editor-in-chief. I am familiar with these various articles, cartoons and editorials published in The News-Bee over the period from March to September, 1914. I have no further explanation to make as to why I repeated the statement that Thurstin, the City Solicitor, would protect the individuals' rights. I know that the cartoon entitled, "At The Last Ditch," was placed in the issue of March 24th, 1914, as a pictorial representation of what we felt was the situation on that particular day lending itself to cartoon in illustration of the street railway situation. I have no further explanation. I knew, as Managing Editor, that the cartoon in the issue of March 25, 1914, headed, "A Desperate Case," was put in the paper. It pictorially represents the news situation presented by the fact that Mr. Tracy and his associates, as legal advisers of the street railway company, seemed to indicate that the last place in which they might try to get relief for the street railway company was in the United States Court. We referred to the United States Court in that cartoon just as it is alleged there; that is, Mr. Tracy is supposed to be saying, "I guess we had better call in Doc Killits." Our purpose in printing the cartoon was not to give the people information on the street car situation. I think the cartoon speaks for itself as to why we used the phrase coming from Mr. Tracy: "Guess we had better call in Doc Killits." I have no further explanation to make. Mr. Hulholland, one of the councilmen of the City of Toledo, planned to test the strength of the three-cent fare ordinance immediately following the close of the meeting of the Municipal Ownership League. Mr. Mulholland told the reporter what he had in mind and what his associates had in mind. The words, "restraining order or no

restraining order" were quoted from Mr. Mulholland. That is the explanation of that particular paragraph. I am not justifying it at all.

The paragraph of March 24, regarding "Holding court over the telephone" was editorial comment on a news item. It was a reflection of what appeared to us to be a crisis in the street railway situation on that day, whereby the city was made a party to this action. It seemed unusual, unconventional and unique to us, that a proceeding should be held over the telephone. We had made news articles out of the fact that the courts have conducted proceedings over the telephone, and something of that kind was in mind the day that that was the subject of editorial comment. Shortly after that, we had an editorial entitled, "Municipal Ownership The Only Way to Street Railway Peace." That editorial was not written in connection with our comment concerning the holding of court over the telephone so far as I know. I did not write the article. It was in our paper. The headline of March 26th, reading, "Killits Upsets Low Fare Ordinance" was justified by the report of Judge Killits' statement. The Judge had rendered no order but he had indicated just what his state of mind was as set forth in that opinion on that particular date as it related to the Schreiber ordinance. That headline is based on the story as set forth in the ruling of Judge Killits.

The Court:

Did you understand that statement to hold that the Schreiber Ordinance was invalid?

Witness:

I would say that we held the statement of your Honor to indicate that that is what your ultimate decision would be, and to that extent. on that particular day, the ordinance was in fact upset, if you would call it that, from the court's opinion. If I may explain, Your Honor,—it has been the province of newspaper men to anticipate within reasonable bounds what any given circumstance is likely to be on a particular day, but I am frank to say that we were exceedingly cautious in that particular case and did not at any time go beyond what we believed to be the bounds of the case as outlined in court, whether by order. by testimony or by direct statements of the court to our reporters.

The witness further testified: The reference in the cartoon of March 27, 1914, to the tinkling bells comes from the habit of Mr. Kapp of ringing a bell when he goes out in his fire apparatus. The wording on the grip carried by Mr. Lapp, "Order From Judge Killits' referred to what the Judge told Mr. Skeldon and Mr. LeBlond and as indicated further by the fact that Mr. Lapp discussed the order from the court with our

reporter. We do not examine the files of the court to ascertain whether or not an order has been put on when we get the information from the court himself. If the court gave us the information that that was what he proposed to do, we would not go further. We would assume that the court was giving us the facts, and rely upon them. Mr. Skeldon and Mr. LeBlond told me that their interview with the court on that day was while he was quite sick in bed in his room at the Hollenden Hotel.

We published only a part of the Socialists' resolution in the article of September 6, 1914, under the heading, "Socialists Call Big Con Trespasser." We left out what I felt was rather a drastic criticism of Judge Killits. I published the article as a matter of news. It was a matter of news that an organized, quasi-political body like the Toledo local of the Socialist party, should express its sentiment within reasonable bounds on a matter of public importance. In publishing the part of the resolution we had no intention of reflecting on the Judge of the Federal Court. It did not refer to or have any allusion to Judge Killits, or anything of that kind. Our paper has a large circulation. I do not know how extensively we mold public opinion.

The Dennie letter, marked "Defendants' Exhibit 1," is written on paper of the office of The News-Bee, on a typewriter in the office, and was signed by Mr. Dennie in the office. I revised certain statements and published the remainder.

Whereupon the Government offered the Dennie letter in evidence and the same was admitted and is hereto attached and made part hereof, marked "Government's Exhibit #8."

RE-DIRECT EXAMINATION

By Mr. Curts:

The witness testified: Paul G. Dennie was not employed by The News-Bee in any capacity at the time he wrote that letter. He had never been employed by us. The resolution of the Socialists, as we printed it, was changed by me.

RE-CROSS EXAMINATION

By Mr. Day:

The witness testified: The part of the resolution we published was different from the communication we received from the Socialists. It was in our opinion modified so as to have less asperity about it. We made no changes in our reference to what they contend.

Defendants called as a witness

FRANK L. SKELDON,

who, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curts:

I am a reporter on The News Bee and have been in the newspaper business about thirteen or fourteen years in this city. Last summer and spring I watched what we call the "business" beat. Under my assignment I covered the matters affecting the Toledo Railways & Light Co. On March 24th, when a motion was filed for leave in this court to make the city of Toledo a party to what is called the Doherty case, I asked Mr. Tracy how they got the order so quickly; it kind of surprised me—and he told me it was phoned to Judge Killits in Cleveland by the Clerk's office, and when I came up to the Clerk's office, I asked Mr. Wilson if he phoned the Judge and my recollection is he said yes and gave me the story. I wrote it in my story in The News-Bee. I was in Cleveland on March 26th when Judge Killits was sick at his rooms on Thursday morning. Judge Killits was ill when we went in. He was lying on the bed, and I think he showed us a copy of this typewritten statement and let us read it and then told us that that had been sent to Toledo and that the newspapers could get copies there, and I remember he was quite ill and he said—now, I don't remember whether he said, "I told Marshal Lapp to go over" or "ordered him over," but it amounted to that. I judged from that that he was going to order him over. The Judge said that he could not afford to have any rioting here in Toledo. Mr. LeBlond and I had a talk with Marshal Lapp at that time regarding his coming to Toledo. Mr. LeBlond reported what he said to The News-Bee. The court went on the bench at Cleveland on March 25 for a short time. I sent in to The News-Bee the article printed March 26th under the heading, "Will Issue Order Friday If Conditions Warrant." I think the article correctly reports what occurred in the matters reported. I took notes on it and used as much as I could on the wire at the time. Practically all of the article in paragraph 13 of the information under the head, "Low Fares Banned by U. S. Judge," immediately under the sub-head, "Seeks Adjustment" and beginning, "I will prepare a short memorandum setting forth the court's conclusions," and continuing through the quoted part of the article, was obtained from a stenographic copy which I had Mr. Kruse make.

Counsel for the defendants hands witness a paper, hereto attached and made part hereof, marked "Defendant's Exhibit #2," which the witness identifies as a transcript of part of the proceedings in this court September 9, 1915, and the same was offered and admitted in evidence, and is attached hereto and made a part hereof.

The witness further testified: This transcript includes what I had when I made my report. The other matters in the article regarding what occurred in the court room were written by me from notes which I made. I have examined the article in the noon edition and it is a fair and accurate report of what occurred. I did not write the headlines.

CROSS EXAMINATION

By Mr. Day:

I am a reporter for The News-Bee. I have nothing to do with the editorial policy.

Defendants called as a witness

HARRY J. HOWARD,

who, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curts:

Counsel for respondents hands witness a bundle of newspaper clippings and asks him what those clippings contain. The witness testifies: These sheets are clippings from the Toledo Times and Toledo Blade beginning about the first of April and running into the latter part of June, and they embody a propaganda initiated by Mr. Henry L. Doherty with the apparent object of inducing, persuading or provoking the representatives of the people in the city council of the City of Toledo to the state of mind that would grant Mr. Doherty the street railway franchise. In the course of this series of advertisements, there is sometimes, as I recall it, comment on the order issued by this court in the action involved in the Schreiber ordinance, and there is a reference to publications in The News-Bee to which Mr. Doherty objected; but in the main, it is a newspaper campaign planned and calculated to persuade the city council to grant a franchise to The Toledo Railways & Light Co. The advertisements average about three-fourths of a page. Some are pages, some half pages and some quarter pages. They appeared in the Toledo Blade as well as the Toledo Times. I should estimate that they used somewhere between fifty and sixty pages. The Times and the Toledo Blade

are circulated largely in the City of Toledo and are published in this city. Three cent fares were discussed in these advertisements almost continuously.

Counsel for respondents hands the witness a paper, hereto attached and made a part hereof, marked "Defendants' Exhibit #3," dated June 16, and the witness testifies that the exhibit has the general appearance of the full page advertisements to which he had referred, and identified it as one of the advertisements which he had referred to as having been printed during the months of April, May and June. The exhibit was offered and received in evidence and is attached hereto marked Defendants' Exhibit #3 and made part hereof.

The Court:

To what point are you offering that Mr. Curts?

Mr. Curts:

To the effect that there was in the City of Toledo during this summer a great deal of public attention devoted to the street car situation, and that, consequently, the newspaper, when it came along during that time, would naturally give attention to it on account of the interest which the people had in it, and on account of the effort of Doherty & Company, who got out these ads. and signed them, to mold public sentiment in their favor, in regard to the reasonableness or unreasonableness of three-cent fare, and the duty of council to repeal the Schreiber ordinance, and on account of their use of the court's opinion in their advertisements.

The witness further testified: I see in the first column of the clipping marked #55 the following language: "If our franchises have expired, the city has lost all right to regulate our fares." Then in capital letters, "The only right the city has is to order us off the streets. The matter is a plain proposition in law. It really needs no corroboration. However, our position has been decided in the opinion handed down by Judge Killits of the Federal Court. The city attorney denies not only the plain proposition but also says that Judge Killits' opinion does not hold to so state." Three or four paragraphs below that I see the following: "We say to you, as we have said before, that we have not had a square deal." "We repeat it." On the sheet which is marked 51, which is the advertisement of March 31st, 1914, about one-quarter way from the bottom in the middle column, I see this language, "At a previous meeting a demand from a councilman for a written statement of what Judge Killits' opinion covered was answered orally by the statement of a representative of the city attorney's office that Judge Killits' opinion 'did not rise to the dignity of a decision.'" In the last column of that ad, about two-thirds of the way down, I see this language: "We are be-

ing subjected to the grossest injustice by reason of the city council being misguided as to their rights regarding the regulation of our fares." The second paragraph beyond that is, "We have even permitted all of this in the face of an opinion of the Federal Court sustaining our rights." In the sheet marked #1 of April 13th, about two-thirds of the way down the column, I find the following language: "We are for the moment being denied a rate of fare that will yield even operating expenses. We are expected to find the money to buy new equipment, build new tracks, and pave the streets, on a day to day lease. We can't do that sum." On the sheet marked #67 from The Times of July 7th, I find an adverrtisement headed, "So The People May Know. A Message to Municipal Ownership Petitioners," and in the last part of the article I find this language: "If the people of Toledo want continual agitation and confusion, we do not intend to throw ourselves into the breach until the public fairly understands that our action is entirely unselfish. We are just going to argue against agitation and confusion. If the people's leaders are playing purely for delay, agitation and confusion, we are going to tell the people so in our advertising columns."

CROSS EXAMINATION

By Mr. Day:

All these articles headed, "So the People May Know" are paid newspaper advertisements. They were carried by The Toledo Blade and Toledo Times.

The witness was asked to produce certain advertisements to which he had referred, and handed counsel clippings marked #65 of June 16, 1914, #55 of June 2, 1914, #51 of May 31, 1914, #41 of April 13, 1914, and also #67 of July 17, 1914. Counsel for the United States offered these pages in their entirety in evidence and they are hereto attached and made a part hereof, marked, respectively, "Government's Exhibits #9, #10, #11, #12, and #13

Defendants called as a witness

HARRY H. ROSS,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Curts:

I am a reporter on The Toledo News-Bee and was a reporter on that paper in September, 1914. I remember the proceedings started in this court against John Quinlivan at

that time. I spoke to Judge Killits regarding the trial of Mr. Quinlivan on contempt proceedings. I do not recall the date exactly. It was on a Saturday, I believe Saturday noon; I asked him at the time, "I would like to ask you, Judge, if you will hear the Quinlivan case yourself." And the reply as I understood it was, "Yes, I shall." This conversation took place over the telephone. I was in the News-Bee office and the Judge was in his private office. I have frequently talked with Judge Killits over the telephone. I am familiar with his voice and I feel positive that I was talking with Judge Killits. He said that he was Judge Killits and I recognized the voice. There is no question about it. The following Monday I incorporated the information which I got from Judge Killits in an article which I believe appeared in The News-Bee. I called up Judge Killits. He did not call me up.

CROSS EXAMINATION

By Mr. Day:

Yes, I remember the Judge's exact language. I feel quite positive over his exact words. Before that I said to him, "Judge I would like to ask you please, will you hear the Quinlivan case yourself?" And his reply, as I understood it over the phone, was, "Why, of course I will." It was a telephone conversation. I had no other talk directly about it. I did not go directly to him and ask him. Mr. Howard asked me to inquire of the Judge, shortly before Saturday noon, I think it was about 11:35 as I recollect, and I asked him over the telephone. I know the Federal Court closed at twelve, and we arranged to get the news in, at least I presumed that, that day, and therefore I would not have had time to go over here; otherwise I do generally talk to him at his office. All I had was a telephone conversation. I have given you what I understood was said. I don't recollect whether it appeared in Saturday's paper or Monday's paper. I wrote it myself.

Counsel for the government handed the witness a copy of The News-Bee of September 12, and to the questions of the court the witness testified: This is what I wrote as a result of my talk over the telephone. The statement to the same effect is the issue of Septembr 14 was written by me on Monday.

The respondent,

NEGLEY D. COCHRAN,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Maxwell:

I am one of the defendants and am connected with the other defendant, The Toledo Newspaper Co. I live in Toledo and have lived here about thirty-two years. I am editor of The News-Bee and have been for about eleven years since its consolidation was formed and it became The News-Bee. Before I became editor of The News-Bee, I was publisher of The Bee before its consolidation, and the President of the company from 1897 until 1903. Before that I had been on the Toledo Commercial and on the Toledo Bee as a reporter and editorial writer and managing editor and in various capacities. I had been interested as an editor in the street railway question in Toledo since an attempt was made to pass a franchise and give them a franchise through an ordinance in 1903. I was connected with that attempt in this way. In 1903 council passed an ordinance giving a twenty-five years' franchise to the street railway company, whatever its name was at that time. The council was almost unanimously Republican—largely Republican, and at the head of the Republican organization in Toledo at that time was Walter Brown. He was also the representative of the street railway company in charge of their franchise negotiations with council. Samuel M. Jones was mayor at that time. The council passed a franchise, or passed an ordinance giving the franchise, practically what the company asked for. Mayor Jones vetoed that franchise. There came a time when one Monday along towards noon when the city hall reporter came in, I asked him if there were any indications that an attempt would be made to pass a franchise that Monday night over Mayor Jones' veto. He said there was not. I went out myself and had not been out more than half an hour possibly, when I learned that it was all set up to pass the franchise ordinance over Mayor Jones' veto on that night, and they had the votes necessary for it,—two-thirds or three-fourths, whichever it was, to pass the ordinance. I went back to the News-Bee's office. The editorial page was closed at that time and I used the first page. I remember I used red ink, marked it "danger tonight" with exclamation points, and then told the people of Toledo what the situation was,—that they had the votes and were going to pass it over Mayor Jones' veto and the only thing that would save the

franchise would be for the people themselves to go to their council chamber and present a petition-in-boots which they had a right to do and stop the council from disobeying the will of the people. There had been meetings all over the town to protest but council was pretty well machine controlled and there was good reason to believe it was going to be done. They did go there that night and presented their "petition-in-boots," as I called it, and the council at that time laid the franchise on the table. Then nothing more was attempted until Sam Jones died. He was succeeded by Robert H. Finch who was President of the council when Jones was Mayor and a Republican, and they thought then that they had everything their own way. They immediately started to try and railroad a franchise through council again. They did. The same council passed another ordinance and Finch vetoed it. We backed Finch up in his veto. And there were two or three petitions in boots presented by the citizens themselves. I did not call them out this time. The citizens themselves did it. They got down on St. Clair St. there outside of the council chamber and Johnson Thurston got up on a big store box and told the people of their rights under the federal and state constitution,—the right of petition. And they called out in concert from the street "Let the franchise alone." The vote to pass it over Finch's veto failed by only one vote. They just lacked one vote of having votes enough to pass it over Finch's veto. Then it went along for,—in the meantime, after Finch had vetoed it, I suggested to Finch that he had stood by the people and he was the legitimate successor of Sam Jones and I suggested that he take the nomination from the hands of the people as an independent, free of all parties, and run, and I was satisfied that the people would back him up, because he had not failed them in this emergency. He told me, the night before the convention, he would not go back on his party and he went over to the convention the next day and accepted the nomination from the hands of the Bosses who had been trying to put over this franchise. Then Brand Whitlock was nominated as an Independent, and Independent candidates for council were nominated and elected and, for several years thereafter, the independent council was elected and Brand Whitlock was elected until last year there was a complete reversal and the independent council was voted out and a republican council and Mayor voted in.

During this public consideration of the franchise question, the newspaper took the position for the citizens of Toledo,—for the people that ride on street cars, and it did everything in its power to help them in this fight and to help to prevent the street railway company from controlling the politics and controlling the council and from dictating what kind of

franchise they should have from the people of Toledo,—did everything we could to protect the people and what they believed were their rights and what we believed were their rights. Neither I nor the paper had any pecuniary interest in the matter. It was for the public interest wholly. The Schreiber ordinance I believe was passed by the Independent council and signed by Mayor Whitlock after the election of 1913,—the municipal election when they had been defeated,—Whitlock had not because he did not run but the Independents had been defeated. The Schreiber ordinance was then passed, as I remember it, to take effect from midnight of the 27th of March of this year when practically all the remaining franchises expired except some inconsequential ones. There was a great deal of public discussion and public interest in the pendency and merits of the Schreiber ordinance. As I remember it, all the candidates for municipal office at that time were pledged to three-cent fares; that is, all the candidates who were elected in the fall of 1913, the council and the mayor and the city solicitor. After the new administration came in, in 1914, the street railway franchise continued to be a subject of public interest, and discussion in the newspaper. The attitude of The News-Bee and the attitude of a large part of the public all through these years, even when there was a lull in the activities of the council, was one of watchfulness, so there always was public interest in it. There was public interest too, then, to see what the attitude of the new administration would be on this franchise proposition because there were some who believed that the street railway interests had supported the ticket that was successful. This was the first partisan municipal ticket that had been elected in Toledo since about 1903. I think the first Independent ticket that carried with it anybody but the mayor was about 1905. This public discussion was not confined to our newspaper. We took more active part than any of the others, I presume. There was discussion in the others. During the election the question was discussed on the stump. I know some of the speakers in the campaign made it a point to assert that The News-Bee had sold out to the Big Con. I remember that that was one thing they discussed. The basis for that charge was imagination. When the new administration came in, in January, 1914, I think negotiations were resumed with the council for the franchise. I don't recall now just what particular discussion was going on but, in some form or other, it was, at times,—not every day. I can't tell just what discussion there was before the suit of Doherty & Company vs. The Toledo Railways and Light Company was filed on January 16th. The discussion started rather aggressively from the street railway company after this

new administration came in, and we were not so aggressively fighting it except to print the news and watch what their moves were and what they were trying to do. I do not remember whether there was an application for a new ordinance in view of the expiration of the franchise in March or not. There was a movement on to get a franchise—to resume negotiations—to open up negotiations with council or resume them on the matter of a new franchise, and the committee was having hearings and discussions with representatives of the street railway company; that was going on. Public discussion and public interest had continued right along. There hasn't been any lull. The council has not taken any action yet. As part in that public discussion I have advocated as the only solution and settlement of the whole thing since the 1st of January, municipal ownership. I have written editorials a number of times on that subject.

Mr. Maxwell:

To what extent has there been discussion of that subject in other newspapers in Toledo?

Mr. Day:

The government objects. The best evidence is the newspapers.

Mr. Maxwell:

I do not care to encumber this record with what has been said. What I want to know is whether the subject has been one of general public interest and discussion.

The Court:

That is already in evidence.

The witness further testified: The policy and attitude of the Toledo News-Bee, with respect to giving publicity to the claims of the street railway and light company has been this: I have refused to publish their paid ads except their purely commercial advertisements: that is, I have refused to accept any of their advertising that carried with it propaganda for a franchise or anything of that kind, although clear back in the fight I told them, while I would not take their money and would not take their advertising, if at any time anything appeared in The News-Bee that was a misstatement of fact or was false or in any way misrepresented them, I would give them space free to state their side of the case. That had been the policy all through this fight,—ever since they started to run their paid advertising,—but I would not take any of their money and would not run any of their advertising. I made one exception to their advertising. When Mr. Doherty was denied a hearing at some mass meeting they had and then decided to have one of his own, I made an exception to this rule and said they would take an advertisement announcing Mr.

Doherty's meeting, for I thought he should have been given a hearing at this meeting in the interest of fair play and I did not want anybody to think we would refuse to let him announce that he was going to have a meeting. We published his advertising, but did anyhow what we would have done if he had not put an advertisement in and we made a news story of his meeting. I believe we published it on the first page—telling the public he was going to have a meeting. We would have done that whether he put the advertising in or not. I did not handle the publication of March 24th, 1914, under the headlines, "Thurstin Declares He Intends to Fight Until There is Nothing Left. Thurstin promises to protect those who are ejected from cars on refusing to pay more than three cents." But there wasn't intention then, nor at any time, by any policy that I directed to convey to the public and give the public to understand that the City Solicitor would protect any person who might refuse to pay more than three cents fare on the street railway system, notwithstanding any finding or holding that this court might enter in the pending cause. As a matter of fact, we did not have it in mind and weren't thinking about any possible violence because of a disobedience of the court's order. We were not thinking of any disobedience of a court's order, and nobody thought or talked that in the office and I certainly, for myself, never believed for one minute that there was any danger of any violence in Toledo, unless it might be some fight between a conductor and passengers on the back end of a street car over some dispute, but I never had any thought of any disobedience of the court's orders and I don't believe the people did. Our only purpose in the publications beginning with that in the second paragraph of the Information, regarding the meeting of the Municipal Ownership League, and followed by publications to the effect that peace was counselled by everybody, was the general purpose of the publication of news articles, to let the people know what was going on. That is the story that probably came from several reporters because of the various angles to this particular news,—the City Hall, the court-house, the Mayor and I don't know who else. I believe in that particular article that John Mulholland told that he was going to be chairman of that meeting and John told what he had in his mind and that was duly reported, but the purpose was,—there was a good deal of interest in that thing, at the time, and the purpose was to let the people know what was going on. We were not trying to shape what they would do or what was to be done. From the time this new administration went in, the first of January, the day after election,—I know on election night, when I knew they had been elected,—I wrote an editorial, and said "The

people have elected these people. They have a right to have what they want. We are for them, whatever they do for the good of the public." And that is the policy we mapped out for the paper, to let these fellows go ahead, and then whatever they thought the people wanted to do, not to get in their way, give them full swing and all of that. Now when it came to this, I did not want to embarrass them, I did not want to embarrass anybody, but I did want to give the people the truth. When I found that there were meetings set and that Mr. Mulholland was telling that there was a time in the lives of men when they must do so and so, and that he would obey a just injunction but that he would not obey one that took away the rights of the people, I did not suppress the publications regarding those meetings, because if there was anything like that in anyone's mind, the very best way in the world to encourage it would be to suppress it. Publicity will choke off,quicker than anything I know of, any move that ought not to go through. If anyone did have in their mind any violence or any unusual agitation at that time, publicity and aeration was the best thing that could possibly happen to them. The saving clause in the story was "Unless better counsel prevail." The subsequent events show the public mind was not what one or two individuals might have wanted it to be. The public mind is never as crazy as some individuals are, and the public does not start agitation and does not want to be agitated. I did not suppress the report of the meeting of the Socialists and the resolutions that they adopted. Very seldom is there any body of men that adopts a set of resolutions that are worth while publishing in full. We boil them down. There are other times when people pass resolutions that we may think are a little too radical and might do more harm than good to publish them in the phraseology in which they are couched and then we will boil them down and try to give the public the essence of them without all the lurid coloring, not to keep any information away from the public, not to suppress any news, but possibly to tone down the manner in which it is presented. We did not suppress that resolution because we wanted to print the news. I print a lot of things I don't believe in. I should not sit back there and decide how much information the people can digest or how much they are entitled to have. I believe there is an implied contract between a publisher and the public. When they give a cent for the paper, his contract is to give them the news. I want to fairly give them the news, just as fairly as my mind permits me to do it. The reason I did not suppress it was because it was news, information that the public wanted to know. Here is a public body, an organized body, that passed a resolution on one phase of a very large

question, a large public issue. It was news to print it. I do not know how large the Socialist Local is here. There has been as high as five thousand votes polled for some Socialist candidates but I would not say there were five thousand Socialists. Sometimes that is the only place a fellow can go when he can't find any place to go on the other tickets, because they generally get pretty good candidates on that ticket anyhow. I did not see these Socialist resolutions before they were published. I did not in fact see that publication. A lot of those things I did not see. There isn't anybody on that paper that does not understand its policy. We do not have to go in and close the door and map out a program of what is ahead. Everybody on there understands that we will print the news and print it fairly, and there is no reporter on there that does not understand its policy, so I don't have to show them everything. In publishing those thing, or anything that is complained of in this Information, I had no notion in my mind about any court, this court or any other court, nor to get anybody else to violate an order of a court. If I were to induce some innocent reader of The News-Bee, or a body of them, to disobey an order of the court, I do not care whether it is this court or some other court, I have got them into trouble that I can't get them out of. It would not be fair; it is not a decent thing to do; it is not the right thing to do. It has not been the policy at any stage of the game for the News-Bee to seek to intimidate any court or try to influence his action. As a matter of fact, it has been a fixed policy of the News-Bee—

Counsel for respondents hands witness two editorials in The News-Bee of March 27th, 1914, the first entitled, "How Toledo Could Do Better Than Cleveland In Fares and Rates," and the second, "The Big Con's Attitude is the Same Old Defiance of the People."

The witness further testified: I got these figures in the first editorial from the official report of 1912 made by the President of The Toledo Railways & Light Company. I had not, before the publication of this second editorial, advocated municipal ownership. It was only this year that I definitely took that position. Up to that time, from clear back in 1903, I had purposely left it open for the people to make any kind of settlement of it that they wanted to. We had been through all this agitation and trouble, and I finally made up my mind that there was only one way out of it, that we would settle it and get it out of politics and stop this fight and get it settled, and that was for the public to own and operate the system themselves.

The two editorials were offered and received in evidence and are attached hereto and made part hereof, marked "Defendants' Exhibit #5."

The witnes further testified: My purpose and object in writing and publishing the editorial of March 25th, entitled, "Municipal Ownership the Only Way to Street Railway Peace" was to try to get council and the city solicitor to see the importance of having the city as ably represented in the court as I knew the street railway company would be, and to have the people of Toledo on equal terms with the street railway company before the court, so that their rights would be as well protected as those of the street railway company, at least. That was the main purpose, what I was driving at. I knew very little about the qualifications of the judge of this court. I had not paid any attention to him. I knew he had been appointed, but was not particularly interested in Judge Killits. There wasn't anything that aroused my interest; I didn't know anything about him, either as a man or as a judge. I referred to the judge of the court as being a "two-legged human being" because I wanted the people of this town to understand that any judge is only a two-legged man, even if he is a judge, and that when he becomes a judge, he does not become any more or less than he was as a man. I did not know what kind of a man Judge Killits was, nor what kind of a judge he was. It was entirely impersonal. It would have been the same as any other judge I didn't know anything about. I know there are different kinds of judges. There are some judges who think in straight lines and see right into the heart of a thing, and even if one side to litigation is protected by very poor counsel, as often happens, the judge will protect them. There are other judges who will render decisions and opinions on the way a case is presented; if one side is represented by strong, capable counsel and the other by weak counsel, perfectly conscientious, possibly, but by weak counsel, then the judge will be influenced by the superior presentation of the case by one side. Here is the way I felt about this: Here were lawyers, strong, capable lawyers, thoroughly familiar with all this fight and with all of the legal end of it, up here representing the street railway company. Here was a young fellow, who might be thoroughly honest—and I haven't any reason to believe he was dishonest—but who never had had any particular experience as a lawyer. In all the years this fight was on, he had not been in it, had not known anything about the litigation or taken any part in it, and I didn't know what might come up in a court whereby, from the inferior presentation of the city's rights the Big Con, the street railway company. would get a strangle hold on the people of Toledo, not necessarily by a judge being corrupt or trying to lean one way or another, but because of superior ability representing the street railway company, and I wanted the city to

have just as good presentation before Judge Killits or any other judge as the street railway company had. I feared, too, that here this young lawyer—I didn't know him—might be like most lawyers are—very vain—and think it would be a reflection on his ability if he had older counsel and assistance, and I was trying to ease the way, trying to point out that it would not be any reflection on him, that it was a big case and a very important one, yet I did not think the city's rights ought to be sacrificed or jeopardized by any fear of offending his feelings. I had no purpose or intent in that article to reflect upon the integrity of the judge of this court. I did not know him, and whether I knew him or not, I had no such purpose. There wasn't any reason why I should. I was using language that you lawyers do not get into documents, but I was using language that the people would understand and tried to make it emphatic. I wanted to make them think about this thing and to keep up the public interest. Through all these fights the other fellows keep busy, the corporation attorneys and so on, and they depend on the people getting tired of a fight and quitting, lying down. I had to keep up the interest of the people themselves to protect their own rights, and that is all I was trying to do. If I had been preparing that to be presented to some lawyers or a judge, I would very likely have couched it in very nice, lady-like language, but I was trying to talk to a lot of human beings and to make them understand what I was driving at and I wanted to get the punch in there so that it would get to them and make them think, and I have been accustomed to writing to the people of Toledo for a good many years and they have come to understand my language and come to understand that I generally say what I mean. I think they understood what I meant there. I did not write the four editorial paragraphs complained of in Paragraph 5 of the complaint. I may or may not have seen them when they were published. I do not know whether I was in town on the 26th of March, 1914, when those paragraphs were published, or not. I wrote the editorial published on September 17, 1914. My purpose was this: That editorial was primarily to make the people of Toledo understand that, no matter what happened to me, no matter what any court might do, that it was not going to change the policy of The News-Bee. Through all this fight, many, many attempts have been made to discredit the News-Bee, to discredit me, to discredit everybody who has taken an active part on the public side of this fight. Now, I wanted them to understand—last fall—I had this in mind, too—last fall there was talking that the News-Bee had sold out to the Big Con, that was part of the campaign fight—I wanted them to understand that the big thing and the

thing I felt was the big thing was not what happened to Neg Cochran or his person, but that the big thing was what had been the big thing all the way through, the public interest, and that the News-Bee was not going to lie down but was going on with this fight and protect the people's interest, no matter what happened. That was the purpose—to brush aside Cochran and say the big issue is still up there, Cochran don't amount to anything. By big issue I mean the public interest in this franchise. I did not have any reference to this suit that was pending here. I was not caring about the suit and was not thinking about it. I knew no court could grant a franchise. I was not afraid of any judge giving a franchise to the street railway company. I didn't know what they might do in a court to tie us up through some legal proceedings and so on, but I knew no franchise could be granted by a judge. I wasn't afraid of anything any court could do, except possibly to delay us or tie us up, but I knew it could not grant the franchise, and I didn't want them to be afraid of a judge, or of a court, or to fear that this thing now is—that our fight was over and Judge Killits could do anything he wanted to, or anything of that kind, that he was just a human being, as I had said he was before.

The Court:

Just a plain, simple sworn officer of the law, that is all.

The witness further testified: Why certainly. I want to go further than that. I had expressed in that editorial what had always been our policy on courts, that is, that I did not want to censor judicial decisions and did not want to influence them. It has been a rule, further, not to try to see how far we could go and still keep within the law on things. I do not believe in newspaper bossism any more than I believe in political bossism, and I do not want cases tried in the newspapers. A judge can go ahead and make a mistake if he wants to, but I don't want to try my case or somebody else's case in the newspaper, and I don't want to influence the jury. Courts will make mistakes, but they have got to learn by their mistakes. I may say, afterwards, what I think, if it is necessary to point a public moral for the public good, but it has never been the policy—and I want to make plain this editorial, we are not trying to censor judicial decisions, we do not want to influence this judge, let him do what he thinks is right, nor are we going to let any judge edit the News-Bee or map out its editorial policy or do anything, right or wrong, to prevent our standing by the people of Toledo, as we started eleven years ago and will continue to a finish.

By "standing by" I mean protecting them in their rights, to help them in their fights. This is a fight between the street railway company—it has been an aggressive fight on the part of the street railway company in all these years, where they have corrupted their politics, tried to control council, tried to control public officials, they have tried in every way they could, even to an advertising boycott on the News-Bee, even to the—well, there are a lot of things about me, but it don't make any difference, I am a small potato—the point of it was the News-Bee was going on through with its policy of defending the public interest in this franchise fight. I had no apprehension of any disorder or rioting as the result of any decision that might be made by this court, nor to any resistance to it. If there had been any order of court at any time, there would not have been any violation, there would not have been any disobedience to it, there would not have been any rioting—I don't think there was ever any thought of rioting. When I saw some of this stuff my judgment was then—I don't know where it came from, but it must have been in Judge Killits' imagination if he thought the people were going to riot here because I never had it, and I asked the boys—I asked them: "There is no danger of any trouble here?" They said: "Absolutely none, unless it may be a little scrap on the rear end of a street car."

The Court:

The News-Bee itself said there was a great deal of anxiety on the subject, didn't it? A. There was.

The Court:

So the court had some comradeship in imagination, then?

The Witness:

Was the statement in the News-Bee before or after you had said over in Cleveland that you were going to defer this thing for two or three days to let the public peace of mind calm down?

The Court:

I think you will find it in the News-Bee of the 27th of March, the day before the ordinance went into effect.

The Witness:

The News-Bee issues for those three days—the News-Bee, if it had wanted to incite any rioting or any disobedience of the order, although I was not expecting any order or was not bothered about it, would have thrown those things up. It would not have said, starting off on one day, this thing is planned unless wiser counsel prevail; and then the next day, throwing up the headlines, "Peaceful counsel is prevailing," and at least three headlines on the after-

noon that meeting was to be held that inflammatory speeches were to be frowned upon and a big headline clear across the page, "Peace." We did not want any rioting and did not want any trouble.

The Court:

As I understood you a few minutes ago, these publications were simply to give the news?

The Witness:

To give the news, certainly.

The Court:

Is that the reason the News-Bee said, in the article of the 25th, that the members of the Central Labor Union would attend that meeting at midnight the 27th in a body and furnish the sinew to see to it that conductors would accept three-cent fare?

The Witness:

If they said that, it was news. As I understand that, that did not involve the imagination of anybody in the News-Bee; as I understand it, it was a report of what they said.

The Court:

Is it your understanding that newspapers, in times of great public excitement, are privileged to publish anything that is a matter of news, even if it may add to the excitement? A. I think they are privileged to print anything that is news, but I think they ought to use their judgment on what they print. There should be editorial judgment used, of course.

The Court:

And if great public excitement affects a case that is pending in court, is a newspaper privileged, even if it publishes truthful news, to add to that excitement in relation to that case?

The Witness:

I don't know whether anybody did that or not. That would be a question of their judgment on whether they were doing it or not. I don't think anybody ought to do that. I don't think anybody ought to embarrass a court and I do not think a court ought to permit itself to be embarrassed.

CROSS EXAMINATION

By Mr. Day:

I am the editor of The Toledo News-Bee, and as editor I am the responsible head of the paper. It was my purpose and editorial policy to print the news in such a manner as the public would understand it and in such way that it would have a punch in it, if a punch is needed. I

said on direct examination that I did not know Judge Killits, either as a judge or as a man, at the time of writing these articles. I know he has held court here as a federal judge for some time. I don't know since what date. I do not remember that the paper has printed articles dealing with his decisions in a number of important cases. It probably has. I do not recall the rebating cases against the Hocking Valley Railway Company and the Sunday Creek, nor the articles on them. I do not recall our articles on the rebating cases against the Ore carrying railroads and the terminal dock companies. I did not, when I made my answer, have those decisions in mind. I should know something about the work of a federal judge before I write about him in the paper; I should not have to know his whole career. I should know something about what he is doing at the time and about the thing I am writing. That is not all that concerns me. My presumption would be, and I would start out with the presumption that he was an honest man and so ought to be there or he would not have got there That would be my presumption unless something turned out to demonstrate that he was not. In writing my articles, I didn't have any presumption that he was other than honest. I had absolutely no intention in these various articles to in any way embarrass the court or interfere with its administration of justice. I don't think of any articles which I am omitting. The purpose of placing in the mouth of the attorney for the railroad company, the words, "We better call in Doc Killits," in the cartoon headed, "A Desperate Case" was—they had tried everything else and had not succeeded in resuscitating the patient and now they were going to try Doc Killits It implies that they would not get relief if they went to Judge Killits unless they were entitled to it. When people call upon a doctor, he generally does the best he can, sometimes one does one thing and sometimes another. I do not know whether the public got that inference from that language. That cartoon was not intended as a matter of policy. Cartoons very often are used to inject a little humor and relieve the tension and give the pople a laugh and sometimes to carry a point. Ridicule is a very keen weapon at times, so they say. I do not know as I would qualify as an expert in the use of it. I do not know how much of the article reading, "Restraining order or no restraining order by the federal court, it is planned to test the strength of this ordinance" was based upon the assertion of Mr. Mulholland, councilman at large, and how much was based on what others

had said; that article is like many of them on a case like this, which has several angles, that is, the city hall man would be getting the city hall end of it, for instance what Thurstin or the mayor might have to say; another man might get Judge Killits; another man might go to Doherty and try to get that end of it. In this particular situation, probably somebody went to the Central Labor Union and probably somebody went somewhere else, and that story is made up from what they all gathered, when they came in, and that is placed together and published. My purpose in publishing the two paragraphs in the editorial complained of in Paragraph 3, in which I referred to the court as a "two-legged human being" and "don't know what kind of a judge he is", was to make them a part of the whole editorial The whole editorial was to call the attention of the people to the general situation then prevailing, and to lead up to this one thing that I had in mind; the purpose of the whole editorial was to let the public see and the counsel see and the City Solicitor see that the city ought to be as strongly represented in any court, this court or any other court, as the street railway, and the purpose of any particular paragraph in that was a part of the general editorial. The paragraph at the bottom of the column, "Holding court over the telephone is a new one but it seems to be a highly satisfactory method of doing business" had no connection with that editorial at all. It was not the punch that I mentioned because I did not write that and it had no connection with the other editorial and was no part of it. It may be that it was on the same page and column. It had no connection with the editorial; but I think it is all right at that. I was the head of the paper. I think it was all right, but it had no connection with the editorial. I do not know whether any order had been issued by the court at the time the article of March 26th, 1914, was printed with large headlines, "Killits Upsets Low Fare Ordinance". I do not know the date when the order of the court was entered in reference to the three cent ordinance. I know that this article says in the box here "That the Big Con has officially notified Mayor Keller that it will 'wholly disregard' the Schreiber three cent fare ordinance which the city insists will go into effect immediately after midnight on Friday." My information comes from reporters and sub-editors there. On anything about this my information would come on what the reporters brought in. If the reporters either brought in or sent in from Cleveland that Judge Killits said or intimated that he was going to issue an order and it would be postponed for two or three days to let public

passion calm down or something of that kind, while I would not know that absolutely, that would be the best information I would have and I would probably act on it. I would print what I thought was the right thing to print.
The Court:
You do not pretend any reporter told you that any time before September, do you?
The Witness:
This story refers there to—
The Court:
You just alluded to information from reporters that the court would hold his order for a few days to let public passion cool down. That thought came to you in September, didn't it? Not in March?
The Witness:
I have not looked these up to see the dates, so that I can't just off-hand say:

The witness further testified: There is no reference to this order but there is this talk about Lapp coming over here and the Judge saying that the Supreme Court left him nothing to do but grant injunctive relief, and so on. Of course, I did not write the headline. It was in my paper and I assumed it was based—that that was a fair and accurate report of the information that they had, and that the headline was based on the news secured. The paragraph in the paper of March 26th, "The case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators will now be placed in the balance by a Judge of the U. S. Court. Let substantial and not technical justice be done" is a good prayer. The purpose of it, I assume, was just to suggest what we thought ought to be done, fair and substantial justice. The suggestion was for anybody that read it I suppose. It was not intended to tell the Judge, having an important case pending, what he ought to do. I don't know whether it would or would not suggest it to his mind. It ought to be in his mind without getting any such suggestion; he wouldn't need that suggestion. I suppose it would call it to his attention if he read it. The paragraph, "Will the police use their clubs on car riders who refuse to pay more than three cents car fare after Friday? They will not. Sam Jones said that the law was only what the people will back up." was just what it says there. The paragraph in the paper of March 31st, 1914, "To the layman it appears peculiar that the city cannot stop the company's cars because the public is entitled to service or requires it, but the company can stop the cars at once on expiration of its franchise rights regardless of the needs of the people. It reminds us somehow of the elder Vanderbilt" is, I think, a statement

of fact. The saying for which the elder Vanderbilt became somewhat famous was "The public be damned." That statement of his might be added by way of innuendo to the reference to what happened in the street car situation. You might do anything with an innuendo. A lawyer can apply an innuendo to anything, anything that wasn't intended, wasn't said, and the language does not justify. I do not know whether or not an intelligent man working in this city also would know that Vanderbilt was the man who said, "The public be damned." He might know that. I write this paper to be circulated among all the people. As to whether or not a lawyer might know something about a statement of that sort that an intelligent citizen would not, I don't know as I would draw a distinction between a lawyer and an intelligent citizen.

The report of the Socialist meeting was published as news, I assume. I did not handle it. It is in the paper. I do not know whether when the language, "We contend that the present Schreiber ordinance is prior to and above any judge or court-made law, and we contend that no judge, Federal or otherwise, has a right to unmake laws made by a duly elected legislative body. We contend further that the people of Toledo have by their vote sustained the Schreiber ordinance," was published, the litigation was pending in this court involving the Schreiber ordinance or not. I am not familiar with the dates. However that would be news, publishing something that is not necessarily said or believed, but reporting what a body of people had said. I do not think that, if a man makes an absolutely irresponsible statement in a meeting or gathering, and I publish that as a news item, I have saved myself or my paper from responsibility. I did not think I saved myself from any responsibility for libel when I published that item. There wasn't any libel on anybody there. As to responsibility for contempt, nobody thought of contempt.

The article regarding the proceedings of the Central Labor Union in the fourteenth paragraph of the Information was published as a news item. I do not remember on what date. On September 11, 1914, we again published Quinlivan's remarks and some additional matter in bracket at the head of a news article. That was published as a news article. The language in the article,—"The street car situation of Toledo is in the hands of a friend of the Rail-light. Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-light. Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolu-

tions and let our federal friend know what we think of him. The burden of proof should have been placed on the Rail Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people. Impeach Killits," is quoted from Mr. John Quinlivan's remarks. It is a news item. The reference to Quinlivan's remarks on the preceding day was a news report. There wasn't any question of editorial policy in that. The first publication was the news report of the thing, and then as I understand it, intervening there was a citation of Quinlivan for contempt. Then the paper gives the news. Probably more attention was directed to what Quinlivan said after he was cited for contempt than there had been before. Then the paper comes and tells that Quinlivan has been cited for contempt and here is why, here is what he said. I was here when testimony was given by Mr. Howard as to the Dennie letter. All I know is what Mr. Howard said, and I believe what he said. I wrote the last editorial, "The News-Bee and Judge Killits." It was published in all editions on September 17th. I suppose it was placed in a prominent place on the front page of all of these editions. I very often run editorials, when I write them, on the front page. I generally put an editorial that I want generally read, on the first page, as on the street railway situation; that is, where I have done a lot of it, in the street railway fight, on the first page. I was cited for contempt after I published the first edition, and after that it may be that we published four more editions. We published other editions, three or four. We published some other editions after I was cited. After I was cited for publishing that, I continued to publish three or four more editions. When we start an editorial or any other completed news story or item in the first edition, it will go right through. In the explanation of this editorial, I did not say that it is an article which expresses it editorially as my opinion that the paper did not intend to interfere with court action. (Counsel for the government hands a paper to the witness.)

The witness further testifies: Here is what I say and here is what I mean. "We have no desire to influence the conduct of any judge in interpreting the law in any particular case, and we have no intention of permitting any judge of any court to influence our judgment in defending the public interests." If a court should find that I were contemptuous in writing a certain article, I would not continue to write certain articles until I had found out whether that was actually contemptuous. If I did find

out that it was actually contemptuous, I would probably stop. I never can tell in advance just what I would do at some point. I assume I would quit that. I said the primary purpose of that article was to show the people of Toledo that this citation of me or The News-Bee for contempt, no matter what direction it might take, was not going—here is what I had in mind—I did not want the people to think this yanking me into court for contempt is going to change the policy of The News-Bee in defending that public interest. I knew that this fight had to be made before the city council elected by the people, that no court could give a franchise, that this whole fight would have to wind up where it began, before representatives of the city in council and then possibly next by a referendum. I did not want the people to get the impression that anything that could happen to me was going to interfere with The News-Bee continuing its policy to defend their interests in this matter; that is what I was driving at. I had stated on direct examination that one purpose was to teach the people not to be afraid of a court, and I will add to that I want the people to respect a court because it is respectable and deserves respect. It did not occur to me that in endeavoring to teach the people not to fear a court, I might teach people not to respect the court. I feel a good many people are like I am—when I walk down the street, I can take off my hat to a judge because he is a just judge, but I would not be afraid of him. I do not want anybody afraid of a judge. I would like to see them all so just that everybody can respect them. As to the language: "We prefer to give every judge free rein to make either a Solomon or a monkey of himself, if either be possible", a judge can't make a monkey out of justice. Justice is always the same. Judges are human beings. One may be a Solomon and the other may be a monkey. So far as applying that editorial to any particular case, my doctrine is to leave it to the reader to place the interpretation on it that his intelligence permits.

RE-DIRECT EXAMINATION

By Mr. Maxwell:

The witness further testified: I do not know when I was served with the citation in contempt, or what editions were published after that time. I think the home edition, the important edition, was off by the time I was cited, was sent for. After I got that citation, I was not back in the office. I came over here to the court about

two o'clock. I did not wait for them to serve me. I came over here and they served me here. I was not back in the office then before these editions were all off.

I do not know why The News-Bee ran in a box the story of why Quinlivan was cited for contempt on September 11th and September 12th. It might be that it was in the night or late edition of one day and in the earlier edition of the next day. Quinlivan had not been cited on September 11th and had been cited before the court on the 12th and the head over the box is the basis for the Judge's charges.

December 29, 1914.

RE-CROSS EXAMINATION

By Mr. Day:

I remember that Judge Killits went on the bench several years ago. I do not remember what the paper published at that time regarding his appointment, history, life, etc.

Counsel for the United States hands the witness some newspaper clippings and asks the witness if they were published in The News-Bee. The witness testified: This story appears to be from The News-Bee. I do not recall it. I don't know whether it is from The News-Bee or not. It looks like it. There isn't any identification mark on it. The News-Bee from time to time since June, 1910, did publish various news articles bearing on the conduct of cases that were in this court. I don't know that we published any comment on the conduct of the Judge. Undoubtedly we published many news stories about the cases that might be in the court, and no doubt we published the news when the Judge was appointed.

I think we get out about five editions a day. When I heard that I had been cited for contempt, I came over to the court along in the early part of the afternoon, after lunch I think. I was cited for an article that appeared in the noon edition about eleven o'clock. The next edition goes into circulation on the street about two o'clock. The next probably around about four; the next probably after the baseball game. That was in September. After that we have a mail edition. This editorial of mine does appear in all of the editions of the paper of that date. I did not write the editorial paragraph of September 5, 1914, reading, "If Judge Killits should be held in Canada while Henry L. Doherty is marooned in Wall Street, what would we ever do? Still Peter Parker is always willing to give us good advice." I do not know what the purpose of the paragraph was. Peter Parker is a man who has lived in Toledo for a number of years and in recent years has been writing a great many communications to the papers on various public questions. He was subjected to some ridicule in the

past and he went away, and when he came back that was passed up and forgotten. I should not say that he is one of the strong characters of the community, but he has been writing frequent communications when public questions would come up, and we have been publishing them when he sent them to us. I have no further explanation to make of that editorial.

Counsel for the United States and for the defendants stipulated, in respect to the third count, that the writ of attachment issued against Howard was not based upon any affidavit or sworn testimony or affirmed testimony.

Thereupon the Government rested its case, and the foregoing together with the exhibits hereto attached is all the evidence given or offered upon the trial of this case.

Thereupon each defendant moved the court to dismiss the first specification of the first count of the information on the following grounds:

1. That the facts alleged in the said specification do not show that said defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

2. That the evidence does not show that said defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

3. That no offense within the jurisdiction of the court is alleged in said specifications or established by the evidence.

The court overruled said motion, to which ruling of the court each defendant then and there duly excepted.

Whereupon each defendant moved the court, separately and in succession, to dismiss each of the other specifications of the first count of the information upon the same grounds.

The court overruled each of said motions, to which rulings of the court as to each of said specifications, each defendant then and there duly excepted.

Whereupon each defendant moved the court to dismiss the first count of the information upon the following grounds:

1. That the facts alleged in the said count do not show that the defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

2. That the evidence does not show that the defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

3. That no offense within the jurisdiction of the court is alleged in said count or established by the evidence.

The court overruled said motion, to which ruling of the court each defendant then and there duly excepted.

Whereupon each defendant moved the court to dismiss the first specification of the second count of the information upon the following grounds:

1. That the facts alleged in said specification do not show that said defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

2. That the evidence does not show that said defendant was guilty of misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice.

3. That no offense within the jurisdiction of the court is alleged in said specification or established by the evidence.

The court overruled said motion, to which ruling of the court each defendant then and there duly excepted.

Whereupon each defendant moved the court, separately and in succession, to dismiss the second specification and to dismiss the third specification of the second count upon the same grounds.

The court overruled said motions, to each of which rulings of the court each defendant then and there duly excepted.

Whereupon each defendant moved the court to dismiss the second count of the information upon the same grounds.

The court overruled said motion, to which ruling of the court each defendant then and there duly excepted.

Whereupon each defendant moved the court to dismiss the third count of the information upon the same grounds.

The court overruled said motion, to which ruling of the court each defendant then and there duly excepted.

Thereupon came the defendants, The Toledo Newspaper Company and Negley D. Cochran, and severally presented and submitted this, their Bill of Exceptions, and prayed that the same be allowed, signed and sealed and made a part of the record; and the assignments of error having been filed, and said Bill of Exceptions having been found by the court to be true, the same is hereby settled, allowed, signed and sealed and made a part of the record in this case on this 5th day of May, A. D. 1915.

John M. Killits,
Judge.

PLAINTIFF'S EXHIBIT 1.

Order for an Information in contempt ommitted from Printed Record being same as original order.

PLAINTIFF'S EXHIBIT No. 2A.

IN THE DISTRICT COURT OF THE UNITED STATES NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

In Equity No. 86.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company,

Defendant.

BILL.

1. The plaintiffs, Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, are partners, doing business under the firm name and style of Henry L. Doherty & Company, in the city of New York and State of New York, and said partnership of Henry L. Doherty & Company and said Henry L. Doherty, Charles T. Brown and Frank W. Frueauff are each and all residents and citizens of said State of New York.

2. The defendant, The Toledo Railways & Light Company, is a corporation, duly created, organized and existing under and by virtue of the laws of the State of Ohio, with its principal place of business located at the City of Toledo, Ohio, and is a citizen of the Northern District of Ohio and the Western Division thereof.

3. On the 16th day of January, 1914, plaintiffs recovered a judgment against the defendant in the Court of Common Pleas of Lucas County, Ohio, in a cause entitled "Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company, plaintiffs, vs. The Toledo Railways & Light Company, defendants," wherein it was ordered and adjudged by said court that said plaintiffs should have and recover from said defendant the sum of Eighty-four thousand, five hundred, seventy-seven and 95/100 Dollars, together with interest thereon, at the rate of six per cent. (6%) per annum from and after the 16th day of January, 1914, and the costs in said proceedings. Said Court of Common Pleas is a court of record of said State of Ohio, having jurisdiction of said cause, and of the parties and subject matter of said proceeding.

4. On the 16th day of January, 1914, plaintiffs caused a writ of execution to be issued by the Clerk of said Court of Common Pleas of Lucas County, Ohio, to the Sheriff of Lucas County, Ohio, upon the foregoing described judgment in said cause, and thereupon said Sheriff returned said writ of execution unsatisfied, and stating thereon that he found no moneys, goods, chattels or property whereon to levy the same within his said county, and the judgment aforesaid is unreversed and is wholly unsatisfied and unpaid; and there is now due to plaintiffs from said defendant, upon said judgment, said sum of Eighty-four thousand, five hundred, seventy-seven and 95/100 Dollars, with interest thereon at the rate of six per cent. (6%) per annum from and after the 16th day of January, 1914, together with the costs of said suit in which said judgment was rendered, taxed at ..... Dollars ($.....); and the value and amount of said judgment so owned by plaintiffs is in excess of the sum of Three thousand dollars ($3,000.00) and the amount in controversy herein exceeds three thousand dollars ($3,000.00) exclusive of interest and costs.

5. The defendant is the owner of the entire street railway system, and all of the street railway property, located and operated in the city of Toledo, Lucas County, Ohio, said property consisting of many miles of street railway tracks and the overhead construction necessary to operate the same by electricity, street cars, power houses, car barns, real estate and a large amount of personal property used as a part of and in connection with said street railway system and property, and in the operation thereof.

Said defendant also owns and operates the entire electric lighting and electric power system and property, furnishing said City of Toledo and its inhabitants with electric lights, electric power and electricity for other uses and purposes. Said electric lighting system and property consists of poles, wires, conduits, power houses, real estate, machinery and personal property used by said defendant in the generating, furnishing and supplying of electricity to the City of Toledo and the inhabitants thereof, and also to other persons in territory adjacent to said City of Toledo, all in Lucas County, Ohio.

Said defendant also owns and operates the entire hotwater heating system in the City of Toledo, known as the "Yaryan Heating System," furnishing the inhabitants of said City with steam or hot water for heating purposes, through a system of pipes, conduits, valves, power houses and other equipment and appliances for said purpose; and said property consists of a large amount of real estate and personal property used as a part of and in connection with said heating system, and in the operation thereof.

Said defendant also owns and operates the entire artificial gas lighting and heating system in the City of Toledo, the same being designed and used for the furnishing of artificial gas for illuminating, heating, power and other purposes for which such gas is used. Said system consists of gas houses, furnaces, tanks, retorts, pipes, meters, valves and other fixtures and appliances, and a large amount of real estate and personal property used as a part of and in connection with said gas plant and system, and in the operation thereof.

Said defendant also owns a large number of franchises or grants issued and granted to it, or acquired by said defendant from others to whom such franchises and grants have heretofore been given and granted by the City of Toledo. All of said street railway system and property, electric system and property, heating system and property, and artificial gas system and property are in fact owned, possessed and operated by the defendant as an entire property as a public utility through and by virtue of which the defendant furnishes to the City of Toledo, the inhabitants thereof, and the public generally, street car service, electrical service, heating service, and artificial gas service in said city of Toledo; and said city, the inhabitants thereof, and the public generally are wholly dependent within the city of Toledo, on said service so furnished by the defendant, as aforesaid.

6. The property described in the preceding paragraph is of great value, being worth many millions of dollars. The gross annual income of said property is in excess of Three Million Dollars ($3,000,000.00) per annum. In order to obtain the greatest amount and value therefor, same should be disposed of as an entirety, by reason of the fact that said properties have been and now are practically merged by physical connections and unity of operation and by economies rendered necessary and possible by such physical connections and unity of operation.

7. All of said property is incumbered, and has liens outstanding and existing against the same, by reason of certain mortgages, to the amount of many millions of dollars. Plaintiffs are informed and believe that the equity of redemption owned by the defendants in said property, over and above the amount of said mortgage liens, is worth and will sell for a very large sum, and in excess of an amount necessary to pay said judgment of plaintiffs, provided said equity of redemption is conserved, administered and disposed of by this court, as prayed for herein. By reason of the facts aforesaid, defendant has no property subject to execution at law, and plaintiffs are without remedy at law, and are unable to enforce or collect their judgment aforesaid, except by the aid of a court of equity.

8. An important part of the property of said defendant, as aforesaid, is the street railway system and property owned and operated by it. Said street railway system and property consists of and is the result of the assembling, acquiring and merging of numerous smaller street railway systems and properties theretofore created and existing in the City of Toledo, which former street railway systems and properties were operating over and upon the streets and public ways in the City of Toledo, under and by virtue of numerous franchises and grants theretofore given and granted by the City of Toledo to the then respective owners of said several street railway systems and properties. Said franchises and grants were given and granted at different times and for different periods of time, and during the last five (5) years, said franchises and grants have been expiring from time to time, so that at the present time the only franchises or grants which, in connection with other franchises and grants, give to the defendant the right to operate its present street railway system and property in the City of Toledo, as a complete street railway system, are certain franchises and grants which will expire by limitation on the 27th day of March, 1914.

9. On the 24th day of November, 1913, the council of the City of Toledo passed an ordinance, entitled, "An ordinance pertaining to the terms upon which The Toledo Railways & Light Company may operate its street cars on streets and public places in the City of Toledo, and authorizing the City Solicitor to take legal steps to enforce this Ordinance," the Mayor of the city of Toledo signed said ordinance on or about the 26th day of November, 1913, and the Clerk of said City is now causing, or will cause, said ordinance to be published, according to law. The following is a true and correct copy of said ordinance:

"AN ORDINANCE.

"Pertaining to the terms upon which The Toledo Railways and Light Company may operate its street cars on streets and public places in the City of Toledo and authorizing the City Solicitor to take legal steps to enforce this ordinance.

"Whereas, the franchise rights of the Toledo Railways & Light Company, as the successor in title to operate street railways on certain streets in the City of Toledo, expire on the 27th day of March, 1914.

"Now, Therefore,

"Be It Ordained by the Council of the City of Toledo, State of Ohio:

"Sec. 1. That upon the following terms and conditions, and upon no other, consent, permission and authority are hereby granted to The Toledo Railways & Light Company to continue from day to day only, after March 27th, 1914, to operate its cars on the streets and portions of streets whereon franchises expire on said March 27th, 1914, the operation to be in conjunction with all the rest of the street railway lines of The Toledo Railways & Light Company in the City of Toledo, so that the whole sytsem will be operated as a unit and as one continuous system.

"Sec. 2. The operation of street cars after March 27th, 1914, on the streets and parts of streets whereon franchises expire on March 27th, 1914, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to March 27th, 1914, and shall be further subject to all the conditions imposed on the said Toledo Railways & Light Company by an ordinance passed July 26th, 1911, pertaining to the operation of street cars by The Toledo Railways & Light Company, and shall be further subject to the condition that the charge which said The Toledo Railways & Light Company may make and receive for one continuous passage over the entire or any part of its street railway system, including the streets upon which franchises have expired, and those upon which franchises shall not have expired, shall not exceed the sum of three cents for each passenger, nor the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled without extra charge to transfer from the route upon which he shall have paid his fare to any other route except in a substantially opposite direction on a route parallel or substantially parallel to said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations, passing the point of transfer, and that the service be regulated by the City of Toledo.

"Sec. 3. This ordinance is subject to the revocation or amendment in whole or in part, expressly or by implication, at any time at the will of council, and the council may at any time increase the obligations of the company for permission to operate upon said lines covered by said franchises, and the continuing by said company of the operation of its cars on lines covered by said franchises expiring March 27th, 1914, shall be deemed an acceptance of this ordinance and all the terms hereof.

"Sec. 4. In case The Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly and according to the tenor or effect thereof, then the

City Solicitor be and he is hereby authorized and directed to take such legal action as may be proper and necessary to enforce the provision of this ordinance or require the company to abandon the streets covered by the franchises above mentioned.

"Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

10. Said ordinance, passed by the Council on the 24th day of November, 1913, as aforesaid, provided, among other things, that the operation of street cars by the defendant after March 27th, 1914, on the streets and parts of streets whereon franchises expire on March 27th, 1914, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to March 27th, 1914, and shall be further subject to all the conditions imposed on the defendant by an ordinance passed July 26th, 1911, pertaining to the operation of street cars by the defendant, and shall be further subject to the condition that the charge which said defendant may make and receive for one continuous passage over the entire or any part of its street railway system, including the streets upon which franchises have expired and those upon which franchises shall not have expired, shall not exceed the sum of three cents for each passenger, nor the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled, without extra charge, to transfer from the route upon which he shall have paid his fare to any other route, except in a substantially opposite direction on a route parallel or substantially parallel to said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations, passing the point of transfer, and that the service be regulated by the City of Toledo. Said ordinance further provides that the continuing by said defendant of the operation of its cars on lines covered by said franchises expiring March 27th, 1914, shall be deemed an acceptance of said ordinance and all the terms thereof, and that, in case the defendant refuses or fails to comply with the terms of said ordinance promptly and according to the tenor or effect thereof, then that the City Solicitor be, and he thereby is, authorized and directed to take such legal action as may be proper and necessary to enforce the provisions of said ordinance or require the company to abandon the streets covered by the franchises above mentioned.

11. The ordinance referred to in the preceding paragraph as having been passed on July 26th, 1911, was passed

by the Council of the City of Toledo on said last-named date, and was signed by the Mayor of the said City on the 3rd day of August, 1911, and thereafterwards published as required by law. The following is a true and correct copy of said ordinance, passed on the 26th day of July, 1911:

"AN ORDINANCE

"Pertaining to the operation of street cars by The Toledo Railways & Light Company on streets and public places in the City of Toledo, for the operation of which franchises have heretofore expired, and on which cars are being operated without franchise rights, and fixing the terms for the future operation of cars thereon.

"Whereas, the franchise rights of The Toledo Railways & Light Company as the successors in title to operate street railways on the following-named streets in the City of Toledo, to-wit:

Adams Street, Michigan to Ashland Avenue.

Ashland Avenue, southeasterly terminus of Ashland Avenue to Collingwood Avenue.

Broadway, Morris to Colburn Street.

Cherry Street, Summit to Superior Street.

Cherry Street, Erie to Bancroft Street.

Collingwood Avenue, Ashland Avenue to Central Avenue.

Collingwood Avenue, Detroit Avenue to Cherry Street.

Detroit Avenue, west City limits to Cherry Street.

Detroit Avenue, Monroe Street to Delaware Avenue.

Dorr Street, Washington Street to City Line.

Delaware Avenue, Collingwood Avenue to Detroit Avenue.

Eleventh Street, Monroe to Washington Street.

East Broadway, Starr Avenue to Earl Street.

Lagrange Street, west City line to Bancroft Street.

Monroe Street, Ontario Street to Auburn Avenue.

Maumee Avenue, North Railroad Avenue to Broadway.

Main Street (East Toledo), Front Street to Starr Avenue.

St. Clair Street, Cherry to Orange Street.

St. Clair Street, Knapp Street to Maumee Avenue.

Summit Street, Cherry Street to Elm Street.

expired on November 10th, 1910; and

"Whereas, no franchise rights for the operation of street cars on said streets or any part of them have been granted by the Council of the City of Toledo; and

"Whereas, The Toledo Railways & Light Company is now operating street cars on all of said streets without right or authority:

"Now, Therefore,

"Be It Ordained by the Council of the City of Toledo, State of Ohio:

"Sec. 1. That upon the following terms and conditions and upon no other, consent, permission and authority are hereby granted to The Toledo Railways & Light Company to continue from day to day to operate its cars upon the streets and portions of streets above set forth, the operation to be in conjunction with all of the rest of the street railway lines of said The Toledo Railways & Light Company in the City of Toledo, so that the whole system will be operated as a unit and as one continuous system.

"Sec. 2. The operation of street cars on streets and parts of streets above set forth, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to their expiration on November 10, 1910, and shall be further subject to the payment by The Toledo Railways & Light Company to the City of Toledo of the sum of Two Hundred and Fifty Dollars ($250.00) for each day that the streets and portions of streets above set forth have been used by said The Toledo Railways & Light Company for the operation of street cars, beginning November 11, 1910; that within ten days after said The Toledo Railways & Light Company has been served by the Clerk of Council with a copy of this ordinance, The Toledo Railways & Light Company shall pay to the City of Toledo, at the rate of two hundred and fifty dollars per day for the period beginning November 11, 1910, and continuing to the day of payment, and that thereafter said The Toledo Railways & Light Company shall pay to the City of Toledo at the rate of two hundred and fifty dollars per day, payable weekly thereafter, and except upon the foregoing terms and conditions, consent, permission and authority are hereby refused and denied.

"Sec. 3. This ordinance is subject to revocation or amendment at any time at the will of the Council.

"Sec. 4. In case The Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly, according to the tenor and effect thereof, then the City Solicitor be and he is hereby authorized and directed to take such legal action as may be proper and necessary to enforce the provisions of this ordinance requiring the Company to pay such amounts, or require the company to abandon the streets above mentioned.

"Sec. 5. The Clerk of Council is directed to deliver a certified copy of this ordinance to The Toledo Railways & Light Company.

"Sec. 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

12. It was, among other things provided in said ordinance set forth in the preceding paragraph that the operation of street cars on streets and parts of streets named in said ordinance should be subject to the same terms and conditions as prevailed thereon under the grants prior to the expiration on November 10, 1910, and that they should be further subject to the payment by the defendant to the city of Toledo of the sum of Two hundred and fifty dollars ($250.00) for each day that the streets and parts of streets above set forth were used by the defendant for the operation of street cars, beginning November 11, 1910, and that the defendant should within ten days after it has been served by the Clerk of the Council of the City of Toledo with a copy of said ordinance pay to the City of Toledo at the rate of two hundred and fifty dollars ($250.00) per day for the period beginning November 11, 1910, and continuing to day of payment, and that thereafter the defendant should pay the City of Toledo at the rate of two hundred and fifty dollars ($250.00) per day, payable weekly thereafter.

On the 31st day of August, 1911, the Board of Directors of the defendant duly adopted a resolution, of which the following is a copy:

"Whereas, the Council of the City of Toledo purported to pass, on the 26th day of July, 1911, and the Mayor of said City purported to approve, an alleged ordinance, purporting to grant the consent, permission and authority of the City of Toledo to The Toledo Railways & Light Company, to continue from day to day to operate its cars upon the streets and portions of streets in said purported ordinance set forth;

"Be It Resolved, by the Board of Directors of The Toledo Railways & Light Company, that said purported ordinance and offer therein contained, be, and the same hereby are, refused, and that no cars of this Company be operated at any time under or in pursuance of said purported ordinance, or of any grant, permission, authority or condition therein set forth."

A copy of said resolution, duly certified by the Secretary of the defendant, was, on the 31st day of August, 1911, delivered to the Clerk of the Council of the City of Toledo.

13. The City of Toledo has never demanded from the defendant the payment of said Two hundred and fifty dollars ($250.00) per day provided for in said ordinance passed on the 26th day of July, 1911, and the defendant has never paid to the City of Toledo any sum whatever on account thereof; and the defendant, as plaintiffs are informed and believe, denies that it is liable for any sum whatever to the City of Toledo for or on account of said provision of said ordinance passed July 26th, 1911.

14. Plaintiffs are informed and believe that if the defendant should operate its cars upon and over the streets and public ways of the City of Toledo on and after the 27th day of March, 1914, the City of Toledo, through its proper officers, will claim and assert that said defendant is bound and obligated thereby to accept, and that by the operation of its said cars will have accepted, each and all of the terms and provisions of said ordinance passed July 26th, 1911, and each and all of the terms and provisions of said ordinance passed November 24th, 1913, and that said City of Toledo, through its proper officers, will claim that the defendant will thereby become liable to pay and will owe to the City of Toledo, for the use of the streets and public ways in the City of Toledo in the operation of said street railway system, at the rate of two hundred and fifty dollars ($250.00) per day, from and after the 11th day of November, 1910, and that said City of Toledo will endeavor to collect from said defendant a sum equal to two hundred and fifty dollars ($250.00) per day for a period beginning on November 11th, 1910, and continuing so long as the defendant shall operate its street cars over the streets and public ways in the City of Toledo.

Plaintiffs also aver, upon information and belief, that the City of Toledo, by its officers, will claim and assert that under and by virtue of said ordinance passed on November 24th, 1913, the defendant will be entitled to receive from passengers carried and transported in its cars only the rates of fare specified in said ordinance, viz: for one continuous passage over the entire or any part of its street railways system, including the streets upon which franchises have expired, and those upon which franchises shall not have expired not to exceed the sum of three cents for each passenger, nor the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled, without extra charge, to transfer from the route upon which he shall have paid his fare to any other route, except in a substantially opposite direction on a route parallel or substantially parallel to

said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations passing the point of transfer, and that the service be regulated by the City of Toledo.

15. Plaintiffs further say that they are informed and believe that certain officers of the City of Toledo have stated and given out publicly that said defendant will be required, on and after March 27th, 1914, if it operates its cars over the streets and public ways in the City of Toledo, to accept the rates of fare specified, in the preceding paragraph hereof, and that the defendant will thereupon become and be liable to the City of Toledo for said rental at the rate of two hundred and fifty dollars ($250.00) per day from and after the 11th day of November, 1910; and further, plaintiffs aver, upon information and belief, that said officers of the City of Toledo, have stated and given out to the public advice and directions that passengers on and after March 27th, 1914, should refuse to pay any fare in excess of that last hereinabove specified, and should demand the right to ride upon said cars at said rates of fare, and have advised that the passengers and the public generally should, unless the defendant accepts said rates of fare, resort to violent methods, in the way of interfering with the operation of said cars and the collection of any additional fares, so as to prevent the defendant from operating its street cars over the streets and public ways of the city of Toledo, unless the defendant shall accede to said rates of fare.

16. If the defendant shall operate its cars over the streets and public ways of the city of Toledo on and after March 27th, 1914, and if by reason thereof said defendant shall thereby become and be liable for said sum for rental or use of the streets and public ways of the city of Toledo, from the 11th day of November, 1910, or if the defendant, by reason of such operation shall thereby become obligated to accept from passengers the rates of fare hereinbefore specified, plaintiffs aver that the large liability and indebtedness on account of said rentals for the use of the streets and public ways will become and be an obligation so large that the defendant will be unable to pay the same, and its equity of redemption in the property will thereby be lost and of no value; and further, plaintiffs aver that if the defendant, by reason of the operation of its cars over said streets and public ways on and after March 27th, 1914, shall thereby become obligated to accept said rates of fare, that its income will be so reduced that its street railway property cannot be operated, except at a great loss, and that thereby its equity of redemption in said property would become worthless and be wholly lost and destroyed.

17. Said rental at the rate of Two Hundred and Fifty Dollars ($250.00) per day for the use of the streets and public ways of the city of Toledo for the operation of the cars of the defendant is unlawful, excessive, unreasonable and confiscatory.

18. Plaintiffs say that said defendant is now, and for several months last past, has been engaged in extensive repairs, rebuilding and improvements of its street railway, as aforesaid, and has expended, and will in the future, unless its property is conserved and administered by this court as herein prayed for, continue to expend large sums for the purposes aforesaid; that said defendant is about to make certain contracts for the repairing, rebuilding and improvement of its said railways and acquiring additional rolling stock and equipment therefor, and has and is about to pledge its credit therefor, and to assume obligations and liabilities by reason thereof; that said defendant has been and is now using and devoting its income received from the operation of its properties aforesaid, in paying for said repairs, rebuilding and improvements, and will, unless otherwise ordered or directed by this court, continue to use a large part of its income for said purposes.

19. Plaintiffs say that by reason of the expiration of the franchises and grants aforesaid, and the passing of the above-recited ordinances by the Council of the said City of Toledo, if said defendant is required to operate under the ordinances aforesaid, it will not be able to do so, except at a loss, and if the said ordinances are effective, and they are accepted by said company by reason of its operation of its cars, as aforesaid, its equity of redemption in its said property, including all such repairs, rebuilding and improvements will thereby be lost and destroyed.

20. By reason of the foregoing facts, the expenditure by said defendant for repairing, rebuilding and improving its said railways, and furnishing equipment and rolling stock therefor, will not enhance the value of said property, and by reason of the expenditures being made by the defendant, and the obligations and liabilities assumed by it by reason thereof, the security of plaintiffs' lien hereinabove set forth is and will be depreciated, unless the property aforesaid is conserved and administered by this court as prayed for herein.

21. By reason of the facts aforesaid, in order that the equity of redemption of defendant in its said property shall not be lost and destroyed, it will be necessary, either that said defendant shall not operate its cars over the streets and public ways of the City of Toledo on and after March 27th, 1914, or that this court shall make such order herein as will permit the

Receiver of said defendant hereinafter mentioned, to operate said cars over such streets and public ways upon such orders of this court as will not obligate said defendant or said Receiver to pay to the City of Toledo said rental at the rate of Two Hundrad and Fifty Dollars ($250.00) per day, and so as to not obligate said Receiver or said defendant to accept the rates of fare hereinbefore specified.

22. In order to preserve the equity of redemption in all of its said property, it is necessary that a Receiver be appointed by this court of and for the defendant, to take possession of all said property of said defendant and operate the same, under the order of this court, and to receive the income thereof, and to possess, operate and manage all of said property until the same is sold or disposed of by the order of this court.

1. Wherefore, plaintiffs pray that a writ of subpoena be issued against the defendant, The Toledo Railways & Light Co. that the defendant's equity of redemption in all of said property may be sold, upon such terms as the court may order, and that from the proceeds of such sale, plaintiffs' claim may be ordered paid.

2. That a Receiver be appointed by the court herein of the defendant and of all of its property, of every name and nature and wheresoever situated, including its street railway system and property, electric system and property, heating system and property, and artificial gas system and property, and of all of its choses in action and moneys, including all amounts on deposit in banks or elsewhere, and that said Receiver be authorized and directed by the court, immediately upon the appointment and qualification of such Receiver, to take possession thereof; and that each and all of the officers, agents and employes of the defendant be directed to deliver any and all of said property in their possession, or under their control, to such Receiver; and that each and all of such officers, agents and employes be enjoined from interfering in any manner or form with the possession and operation of such property by such Receiver.

3. That such Receiver be authorized and directed by this court to report to this court any and all agreements heretofore entered into by the defendant, for the repairing, rebuilding or improvement of its said railways, or the furnishing of equipment and rolling stock therefor, which have not been fully executed, to the end that the court, by its order, may direct said Receiver to cancel and annul such of said contracts and agreements as are detrimental to the rights and liens of these plaintiffs, and the value of the equity of redemption of said defendant.

4. That in the event plaintiffs' claim is not paid or said property is not sold or disposed of prior to the 27th day of March, 1914, if the court deems necessary, the plaintiffs may then be permitted to have the City of Toledo made a defendant herein, and that such orders shall then be made herein as will protect said defendant and its said equity of redemption from the injustice of having said City of Toledo enforce or attempt to enforce said provision of the ordinance of July 26th, 1911, relating to the payment of two hundred and fifty Dollars ($250.00) per day rental, and the provisions of the ordinance of November 24th, 1913, relating to the fares specified in said ordinance.

5. That upon motion of plaintiffs at any time hereafter filed in this proceeding, a temporary injunction or temporary injunctions may be issued, restraining the defendant, and its then officers and agents from entering into any contract or contracts whereby the defendant becomes obligated to pay, from its income, for materials, improvements or betterments upon its said property which may be lost or rendered valueless.

6. That the court may direct said Receiver, on and after the 27th day of March, 1914, and until the repeal of the ordinance passed by the Council of the City of Toledo, as aforesaid, to discontinue the operation of the cars of said defendant over the tracks of said defendant covered by the franchises which have theretofore or upon that date will have expired.

7. Plaintiffs further pray for any and all other relief to which they may be entitled by reason of the premises.

Charles A. Frueauff,
T. H. Tracy,
E. J. Marshall,
Solicitors for Plaintiffs.

.....
Of Counsel.

State of Ohio, Northern District,
County of Lucas, ss.

E. J. Marshall, being first duly sworn, deposes and says that he is one of the Solicitors for the plaintiffs, and is duly authorized to make this affidavit and verify the foregoing bill; that he has read the foregoing bill, and that the allegations in said bill contained are true, excepting as to such allegations as are therein stated to be on information and belief, and as to each and all such allegations, affiant believes them to be true.

E. J. Marshall.

Sworn to before me and subscribed in my presence this 16 day of January, 1914.

(Seal.) Johnson Thurston,
Notary Public.

The United States of America,
Northern District of Ohio, Western Division, ss.

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Bill of Complaint filed January 16, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21st day of September, A. D. 1914, and in the 139th year of the Independence of the United States of America.

(Seal.)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company,
Defendant.

MOTION FOR THE APPOINTMENT OF A RECEIVER.

Now comes the plaintiffs, and move the court that a receiver be appointed herein of the defendant, and of all of its property, of every name and nature, and wheresoever situated, and that said receiver be authorized, ordered and directed, all as prayed for in the bill heretofore filed by plaintiffs in this cause.

Chas. A. Freuauff,
E. J. Marshall,
Thos. H. Tracy,
Solicitors for Plaintiffs.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion for the appointment of a Receiver, filed in said court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness my official signature and the seal of said court, at Toledo, in said District, this 26th day of December, A. D. 1914, and in the 139th year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By J. W. Wilson,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company,
Defendant.

MOTION OF PLAINTIFFS TO FILE SUPPLEMENT AND AMENDMENT TO THEIR BILL AND MAKE THE CITY OF TOLEDO DEFENDANT.

Now come plaintiffs and respectfully move this honorable court for an order permitting them to file an amendment and supplement to their original bill filed herein and to make the city of Toledo a defendant herein, said city of Toledo being a necessary and proper party to a complete determination of this cause.

C. A. Frueauff,
E. J. Marshall,
Thos. H. Tracy,
Solicitors for Plaintiffs.

The United States of America, Northern District of Ohio, Western division, ss:

I, B. C. Miller, clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21st day of September, A. D. 1914, and in the 139th year of the Independence of the United States of America.

(Seal) B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2D.

The United States of America, Northern District of Ohio, Western Divisision, ss:

At a stated term of the District Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the last Tuesday in October being the 28 day of said month, in the year of our Lord, one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-eighth, to-wit: on Tuesday, the 24 day of March, A. D. 1914.

Present: Honorable John M. Killits, United States District Judge.

Among the proceedings then and there had were the following, to-wit:

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company,
Defendant.

In Equity No. 86.

This day came the plaintiffs and presented their motion for an order permiting them to file an amendment and supplement to their original bill filed herein and to make

the city of Toledo a defendant herein, and upon consideration the court finding that the City of Toledo is a necessary and proper party to a complete determination of this cause, the court hereby orders that said plaintiffs be and they are hereby permitted to file an amendment and supplement to said bill and to make the city of Toledo a party defendant hereto, and it is ordered that a subpoena issue for said defendant to be served and returned in accordance with the law.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original order entered upon the order book of the said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

(Seal) B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2E.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown, and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,
Defendants.

AMENDMENT AND SUPPLEMENT TO THE BILL.

1. By leave of court first obtained, plaintiffs present this, their amendment and supplement to their bill, and respectfully show to the court, as follows:

2. The defendant, the City of Toledo, is a municipal corporation, duly incorporated, organized and existing under and by virtue of the laws of the state of Ohio, and is a citizen and resident of the northern district of Ohio, western division.

3. Plaintiffs adopt, reaver and reaffirm each and all of the allegations of their bill heretofore filed herein, to the same extent and with the same effect as though each and all of the said allegations were fully copied and incorporated herein.

4. Since the filing of their said bill, the defendant, the Toledo Railways & Light Company, has requested the defendant, The City of Toledo, through its proper officers, to suspend the operation of the ordinance referred to in said bill as having been passed on November 24, 1913, from and after March 27, 1914, pending the negotiations between said The Toledo Railways & Light Company and the City of Toledo, with reference to a new franchise for the maintenance and operation of a street railway system in the City of Toledo, but, notwithstanding the fact that negotiations are now actively pending, and have been since the adoption of the ordinance last aforesaid, between said City of Toledo and said The Toledo Railways & Light Company, with reference to said new franchise, the City of Toledo, through its council, on Monday, March 23, 1914, declined and refused to suspend the operation of said ordinance.

5. Notwithstanding the fact that the defendant, The Toledo Railways & Light Company has, holds and owns a number of franchises and grants from the City of Toledo, permitting it to operate street cars over a large number of the streets of said City of Toledo, and which said last mentioned grants and franchises will not expire on March 27, 1914, or for a long period of time thereafter, the City of Toledo, through its officers, agents and employes give out and state that said City of Toledo, and said officers, agents and employes, will enforce the terms and provisions of said ordinance passed on November 24, 1913, after the 27th day of March, 1914; and plaintiffs further say that said City of Toledo, its said officers, agents and employees, will wrongfully and falsely inform and instruct the public and the persons and passengers riding and attempting to ride upon the cars of said defendant in the City of Toledo, after March 27, 1914, that such persons and passengers will each be entitled to ride upon said cars for a three cent fare, and that they, said officers, agents and employes of the City of Toledo wil protect said persons and pas-

sengers in their alleged rights to ride for three cent fares, as aforesaid, and said officers, agents and employes are now publicly advising, through the newspapers and otherwise, that all persons and passengers desiring to ride upon said cars after March 27, 1914, shall refuse to pay more than a three cent fare each.

6. That the defendant, The Toledo Railways & Light Company, is now carrying upon its cars about one hundred twenty-five thousand (125,000) pay passengers per day, and the service furnished by said The Toledo Railways and Light Company is the only public means of transporting passengers through or over the streets of the City of Toledo.

7. That the defendant, The Toledo Railways & Light Company, cannot and should not, for the reasons stated in the bill and in this amendment and supplement thereto, carry passengers for the rate fixed in said ordinance passed on November 24, 1913, nor should it be subjected to pay the rental of two hundred fifty dollars ($250.00) per day provided for in said last mentioned ordinance, and said ordinance passed July 26, 1911.

8. That if the defendant, The Toledo Railways & Light Company, refuses to accept three cent fares, as aforesaid, after March 27, 1914, the persons and passengers riding and attempting to ride upon the cars of said defendant will, under the advice of the afficers, agents and employes of the City of Toledo, refuse to pay the fare to which said defendant is entitled, and confusion, trouble, annoyance and great loss, injury and damage will be suffered, both by the defendant, The Toledo Railways & Light Company, and these plaintiffs, as lienholders.

9. That on or about the 8th day of January, 1912, the defendant, The Toledo Railways & Light Company entered into an agreement with the then mayor of the city of Toledo and a committee of the coucil of the City of Toledo, said mayor and committee of the council purporting to act for and on behalf of the City of Toledo, under and by virtue of the terms of which agreement it was provided that The Toledo Railways & Light Company should, pending the final settlement of the new franchise for street railway purposes, carry passengers upon all of its cars in the City of Toledo, between the hours of 5:30 a. m. and 7:30 a. m. and 4:30 p. m. and 6:30 p. m. at the rate of three cents (3¢) per passenger, cash fare, or five (5) tickets for fifteen cents (15¢) and during the remainder of the hours of the day at the rate of five cents (5¢) cash fare, or six (6) tickets for twenty-five cents (25¢) with universal transfers for all pay passengers.

That the above mentioned rates of fare were a very material reduction from the rates of fare to which said The Toledo Railways & Light Company was then and is now entitled to charge; that The Toledo Railways & Light Company immediatey put said rates of fare into effect, and has continued said rates of fare up to and including the present time, and has in good faith carried out on its part all of the terms and provisions of said agreement made on the 8th day of January, 1912, and is still carrying out the terms and provisions of said agreement, and is willing to continue to carry out the terms and provisions of said agreement, until such time as the new franchise is agreed upon and adopted.

That the City of Toledo is attempting, by its officers and agents, through the terms and provisions of the ordinances passed on November 24, 1913, and July 26, 1911, respectively, to force upon the defendant, The Toledo Railways & Light Company, an unjust, arbitrary and confiscatory rate of fare and rental, and said officers, agents and employes, give out, state and threaten that they will either force The Toledo Railways & Light Company to accept the terms and provisions of said two ordinances, or compel The Toledo Railways & Light Company to cease operating its cars in the City of Toledo after March 27, 1914.

That The Toledo Railways & Light Company can not, for the reasons stated in the bill and in this amendment and supplement thereto, accept the rates of fare and the terms and provisions of the ordinances of November 24, 1913, and July 26, 1911, and to stop the operation of its cars after March 27, 1914, would paralyze the business and social activities of the City of Toledo, greatly inconvenience and injure the public, and be of great and irreparable damage to the defendant, The Toledo Railways & Light Company, and to these plaintiffs as lienholders.

Wherefore, plaintiffs respectfully pray as in their bill, and also ask this honorable court for an order and temporary injunction herein against the City of Toledo, its officers, agents, employes, and all other parties and persons whomsoever to whom notice thereof is given, enjoining and restraining them, and each of them, until the further order of this court, from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on July 26, 1911, described in the bill heretofore filed herein, and relating to the payment of two hundred fifty dollars ($250.00) per day rental by The To-

ledo Railways & Light Company, and from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on November 24, 1913, described in the bill heretofore filed herein, relating to the fares to be charged by The Toledo Railways & Light Company after March 27, 1914, and such other order in the premises as to the court may seem proper, and that upon the final hearing of this cause, said temporary injunction and order may be made perpetual, said ordinances declared null, void and of no effect; and plaintiffs further pray for all further relief to which they may be entitled by reason of the premises.

Chas. A. Freuauff,
E. J. Marshall,
Thos. H. Tracy,
Solicitors for Plaintiffs.

State of Ohio, County of Lucas, ss.

Henry L. Doherty, being first duly sworn, deposes and says that he is a member of the firm of Henry L. Doherty & Company, and one of the plaintiffs in the above entitled cause, and that the statements and allegations contained in the foregoing amendment and supplement to the bill are true, except such allegations and statements as are therein stated to be made on information and belief, and as to all such statements and allegations, affiant believes them to be true.

Henry L. Doherty.

Sworn to before me and subscribed in my presence this 24th day of March, 1914.

(Seal) Fred S. Zink,
Notary Public, Lucas County, Ohio.

Plaintiff's Exhibit No. 2E.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and the City of Toledo,

Defendants.

PRECIPE

To the Clerk of said Court:

Issue subpoena in the above entitled cause for the defendant, the City of Toledo, returnable according to law.

Chas. A. Frueauff
E. J. Marshall
Thos. H. Tracy
Solicitors for Plaintiffs.

Filed Mar. 24, 1914, at o'clock M. B. C. Miller, Clerk U. S. District Court, N. D. O.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Amendment and Supplement to the bill filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2F.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company,
Defendant.

ANSWER OF THE TOLEDO RAILWAYS & LIGHT COMPANY.

Now comes the defendant, The Toledo Railways & Light Company, and for its answer to the bill herein, states as follows:

1. Defendant admits each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7.

2. Defendant admits the allegations of paragraph 8, with the exception that it denies that at the present time the only franchises or grants which, in connection with other franchises and grants, give to the defendant the right to operate its present street railway system and property in the city of Toledo as a complete railway system, are certain franchises which will expire by limitation on the 27th day of March, 1914; and defendant avers that it has and owns franchises permitting it to operate a practically complete street railway system in the city of Toledo, which will not expire prior to the 6th day of October, 1915, as hereinafter more fully set forth.

3. Defendant further says that on and prior to the 6th day of October, 1890, one The Toledo Consolidated Street Railway Company, a corporation then duly organized and existing under the laws of the State of Ohio as a street railway company, was the owner of, in possession of, and operating a street railway system in said city of Toledo, under and by virtue of certain grants and franchises from the city of Toledo then owned by said The Toledo Consolidated Street Railway Company:

That on or about the 13th day of March, 1890, the common council of the city of Toledo duly passed an ordinance granting to William A. Collins, trustee, his successors in trust and assigns, the right to construct, maintain and operate a street railroad along certain streets and public ways in said city of Toledo; that thereafter, to-wit, on or about the 6th day of October, 1890, said common council of the city of Toledo duly passed an ordinance granting to said William A. Collins, trustee, his successors, heirs and assigns, the right to construct, maintain and operate an extension of the lines of street railway theretofore authorized to be constructed in the ordinance hereinbefore mentioned as having been passed on the 13th day of March, 1890.

The following is a true and correct copy of said ordinance so passed on October 6, 1890:

"AN ORDINANCE

"To grant to William A. Collins, trustee, his successors and assigns, the right to construct, maintain and operate a double track, standard gauge extension of the authorized line of street railway from Front Street along Bridge street, the bridge over the Maumee river, Cherry street to Summit street Monroe street, and to authorize the transfer by said trustee of his rights and franchises.

"Whereas, William A. Collins, trustee, has duly made application in writing to the common council of the city of Toledo, for leave to himself, his successors and assigns, to construct, maintain and operate an extension of the lines of street railway heretofore authorized to be constructed by him, by an ordinance entitled, 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo', passed March 13, 1890, as follows:

"Commencing at the point where said line of street railway authorized by and in said ordinance intersects Bridge street on Front street, thence along said Bridge street to the bridge crossing the Maumee river, between the northwesterly end of Bridge street and the southeasterly end of Cherry Street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry Street Bridge', to Cherry street, thence along Cherry Street to Summit street, and thence along Summit street to Monroe street, as a double track, standard gauge street railway, and has obtained and produced to the com-

mon council the written consent therefor for the owners and holders of more than one-half of the feet front of the lots and lands abutting on said Bridge street between Front street and the channel of Maumee river, and on Cherry street between the channel of the Maumee river and on Summit street between Cherry street and Monroe street, and the common council deem such extension beneficial to the public:

"Therefore:

"Section 1. Be it ordained by the common council of the city of Toledo that William A. Collins, trustee, his successors, heirs and assigns, be and they hereby are granted permission and are authorized and empowered to construct, maintain and operate an extension of the line of street railway heretofore authorized by said ordinance, as aforesaid, as follows: Commencing at the point where said line of street railway authorized by and in said ordinance intersects Bridge Street on Front street, thence along said Bridge street to the bridge crossing the Maumee river between the northwesterly end of Bridge street and the southeasterly end of Cherry Street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry Street Bridge', to Cherry street, thence along Cherry Street to Summit street, and thence along Summit street to Monroe street, as a double track, standard guage street railway, together with the necessary tracks, turnouts, sidetracks, turntables, switches, curves and appliances, and this grant and permission shall be and remain in force for the period of twenty-five years from and after the date of the passage of this ordinance, provided that shall be subject to all and singular the provisions of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and also subject to the provisions of an ordinance, entitled 'An ordinance to authorize the use of streets, alleys, and other public places in the city of Toledo for the purpose of constructing and operating electric mains, wires and appliances for the propelling and operating of street cars, passed November 25, 1889, so far as said ordinances or either thereof may be applicable hereto and not inconsistent herewith; and

"Provided, further, that said William A. Collins, trustee, his successors, heirs or assigns, shall in constructing, maintaining and operating said extension of said street railway, as aforesaid, use and occupy only the ex-

isting street railway tracks on said streets and said bridge, and for the purpose the said William A. Collins, trustee, his successors and assigns, are hereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front street along Bridge street and across the bridge along Cherry street to Summit street, and along Summit street from Cherry street to Monroe street, in all respects under and in pursuance of an ordinance of the city of Toledo, entitled 'An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its charters,' passed November 9, 1885, and said trustee, his successors and assigns, shall enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, successors and assigns, and the said The Toledo Consolidated Street Railway Company shall during the term of this grant mutually transfer passengers from the lines of the other for a single fare of five cents, for a continuous passage over said railroads, said fare to be paid and collected by the operators of the railroad upon which such passenger shall first take passage.

"Section 2. The cars upon said extension of said railway and over and along said route above described shall be propelled and operated by means of electricity, transmitted along wires or used by means of storage batteries or other devices of electricity as a motive power, compressed air, gas or cable, used as a motive power, directly or indirectly, under such rules, regulations and conditions as the common council have heretofore or may hereafter prescribe, and said trustee, his successors, heirs and assigns, shall place and continue on said extension of said railway good cars with modern improvements for the convenience and comfort of passengers, and shall run cars on said extension on such schedule of time as public convenience may in the opinion of the council require.

"Section 3. Said trustee, his successors, heirs or assigns, shall not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same may now or hereafter be constructed, or from any point on its line as it shall be extended to any point on said extension.

"Section 4. The work of the construction of said extension of said street railway shall be commenced as

soon as practicable after the passage of this ordinance and shall be completed and in operation on or before the 13th day of March, 1891.

"Section 5. The said trustee, his successors, heirs and assigns, shall construct said extension and all appliances and structures appertaining thereto, under the direction of the city civil engineer and subject to the approval of the city civil engineer and city electrician and when the city shall deem it necessary to grade or regrade, pave or repave or otherwise improve or repair said streets, or any part thereof, the said trustee, his successors, heirs or assigns, shall improve or repair in such manner and with such materials as the common council may direct such portion of all that part of said streets which lies between the outer rails of said tracks, whether the same may be constructed by the said trustee, his successors, heirs or assigns, or leased or purchased from others, as the common council of said city may from time to time by ordinance prescribe, or pay to the said city the costs of so improving or repairing the same.

"Section 6. If said trustee, his successors, heirs or assigns, shall fail or refuse to comply with the conditions of this ordinance, or of an ordinance entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, or of the general ordinances of the city of Toledo regulating the operations of street railways and amendments existing or hereafter made thereto so far as the same are applicable and not inconsistent with the conditions of this ordinance, the rights and privileges hereby granted shall be deemed forfeited and the city of Toledo shall have the right to re-enter and take possession of the same to the exclusion of the said trustee, his successors or assigns.

"Section 7. If said William A. Collins, trustee, shall assign and transfer to The Ironville Street Railway Company, of Toledo, Ohio, all his rights, title, claims, interest and franchises heretofore granted to said trustee, his successors or assigns, by said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and in this ordinance, and said The Ironville Street Railway Company shall file with the city clerk of the city of Toledo, its acceptance in writing of the terms and conditions of said ordinance passed March 13, 1890,

and of this ordinance and said The Ironville Street Railway Company shall construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then all the rights and privileges and franchises heretofore granted and authorized in said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and in this ordinance, shall pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner and to the same effect as though each and every of the grants in said ordinance mentioned had been therein made directly to said company, its successors and assigns, and said company, its successors and assigns, shall in all respects be governed by the terms, conditions and limitations of said two ordinances.

"Section 8. This ordinance shall take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, his successors, heirs or assigns, with the clerk of said city of a written acceptance of the terms and conditions hereof and upon the filing by said The Toledo Consolidated Street Railway Company with the said clerk of said city of a written consent to the transfer of passengers, as hereinbefore provided for.

"Section 9. All ordinances and parts of ordinances inconsistent herewith are hereby repealed."

Said ordinance, passed on the 6th day of October, 1890, as aforesaid, provided, among other things, that said William A. Collins, his successors and assigns, are thereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front street along Bridge street and across the bridge and along Cherry street and along Summit street from Cherry street to Monroe street, in all respects under and in pursuance of an ordinance of the city of Toledo, entitled "An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its charters," passed November 9, 1885; and it was further provided in said ordinance that said trustee, his successors and assigns, should enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, his successors and assigns, and the said The Toledo Consolidated Street Railway Company should, during the term of the grant of said ordi-

nance passed on October 6, 1890, mutually transfer passengers from the lines of the other for a single fare of five cents (5¢) for a continuous passage over said railroads, said fare to be paid to and collected by the operators of the railroad upon which such passenger shall first take passage.

Said ordinance further provided that said trustee, his successors, heirs and assigns, should not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same might then or thereafter be constructed, or from any point on its line as it should thereafter be extended to any point on said extension.

It was further provided in said ordinance that if said William A. Collins, trustee, should assign and transfer to The Ironville Street Railway Company, of Toledo, Ohio, all his rights, title, claims, interest and franchises theretofore granted to said trustee, his successors and assigns, by said ordinances, and said The Ironville Street Railway Company should file with the city clerk of the city of Toledo its acceptance in writing of the terms and conditions of said ordinance passed March 13, 1890, and of said ordinance passed October 6, 1890, said The Ironville Street Railway Company should construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then, and in that event, all the rights, privileges and franchises theretofore granted by said two ordinances to said William A. Collins, trustee, his successors and assigns, should thereby pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner and to the same effect as though each and every of the grants in said ordinances had been made directly to said company, its successors and assigns; and it was further provided that said ordinance, passed October 6, 1890, should take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, of a written acceptance of the terms and conditions of said ordinance and upon the filing by said The Toledo Consolidated Street Railway Company with the clerk of the city of a written consent to the transfer of passengers, as thereinbefore provided for.

That said ordinance was duly approved by the Mayor and published, as required by law, and the written ac-

centance of William A. Collins, trustee, above referred to, was duly filed with the clerk of said city on or about the 13th day of October, 1890, and said The Toledo Consolidated Street Railway Company duly filed its acceptance with the city clerk of said city of Toledo, on or about the 13th day of October, 1890, in words and figures, as follows, viz.:

"To the Honorable Common Council of The City of Toledo.

Gentlemen:

In pursuance of said ordinance, The Toledo Consolidated Street Railway Company hereby agrees to transfer passengers to and from the lines of its road in accordance with the provisions of an ordinance, entitled "An ordinance to grant to William A. Collins, trustee, his successors or assigns, the right to construct, maintain and operate a double track standard gauge extension of the authorized line of street railway from Front street along Bridge street, the bridge over the Maumee river, Cherry street, and Summit street to Monroe street, and to authorize the transfer by said trustee of his rights and franchises," passed October 6, 1890.

In Witness Whereof the said The Toledo Consolidated Street Railway Company has caused its name to be signed hereto by Albion E. Lang, its vice-president, and its seal to be affixed by Chas. L. Wight, its secretary.

The Toledo Consolidated Street Railway Company,
By (Signed) A. E. Lang, Vice-President.
(Seal) Attest (Signed) Chas L. Wight, Secy."

4. Defendant further says that, in pursuance of the terms of said ordinance last above set forth, said William A. Collins, trustee, did thereafter assign all of his right, title and interest in and to said ordinances and each of them to said The Ironville Street Railway Company, and that said company thereupon filed its written acceptance of the terms thereof with the clerk of the city of Toledo, all as provided in said ordinance, and said The Ironville Street Railway Company did thereupon construct, maintain and operate a street railway upon the route described in said ordinance passed on the 13th day of March, 1890, and in said ordinance passed on the 6th day of October, 1890, all within the time and in the manner as provided for in said ordinance.

5. That immediately upon the commencement of the operation of said street railway system by The Ironville Street Railway Company, said The Ironville Street Railway Company and said The Toledo Consolidated Street

Railway Company at once entered into and operated a system of transferring of passengers between their respective lines, all as provided for in said ordinance passed October 6, 1890, and continued to operate said system of transfer of passengers until all of said street railway property of said The Ironville Street Railway Company was thereafter purchased, acquired and taken over by The Toledo Consolidated Street Railway Company.

That this defendant is the successor in title to all of the street railways, properties and franchises of every name and nature theretofore owned, maintained or operated by The Toledo Consolidated Street Railway Company and The Ironville Street Railway Company, and is now the owner of all of the rights, privileges and property granted by the city of Toledo to said William A. Collins, trustee, The Ironville Street Railway Company and The Toledo Consolidated Street Railway Company, under and by virtue of the terms and provisions of said two ordinances aforesaid, passed on the 13th day of March, 1890, and the 6th day of October, 1890.

6. That at the time of the passage of said ordinance to William A. Collins, trustee, under date of October 6, 1890, The Toledo Consolidated Street Railway Company owned and operated, under franchise theretofore granted by the city of Toledo, the principal street railway system then existing in the city of Toledo; that said system so owned by The Toledo Consolidated Street Railway Company at said time included, among others, the following principal lines and streets in the city of Toledo, viz.:

The Summit street and Broadway line, extending from Bay View Park to Walbridge Park.

The lines upon Monroe Street, Dorr Street, Adams street, Ashland Avenue, Collingwood Avenue, Cherry street, St. Clair street, with the extensions thereof, Superior street, and extensions thereof, Erie street, and the extensions thereof, Michigan street, and extensions thereof.

All street railway lines then crossing the Maumee river in said city, and all street railway lines on the east side of the Maumee river, with the exception of the line owned by The Ironville Street Railway Company.

And all other lines in the city of Toledo, with the exception of what is now known as the Bancroft Belt Line, the Huron street line, the South street line, and the Indiana avenue line and Stickney avenue line.

That under and by virtue of the terms and provisions of said ordinance passed by the common council of the city of Toledo, under date of October 6, 1890, the fran-

chises and rights theretofore granted by the city of Toledo and then owned by The Toledo Consolidated Street Railway Company, under and by virtue of which it was maintaining and operating its said system on said 6th day of October, 1890, were continued and extended by said grant contained in said ordinance passed October 6, 1890, until and including the 6th day of October, 1915, and by reason thereof, the right of this defendant to construct, maintain and operate its street railway tracks on all portions of said system originally owned by The Toledo Consolidated Street Railway Company is in full force and effect, and will continue to be in full force and effect until and including the 6th day of October, 1915.

7. That under and by virtue of the terms and provisions of the franchises and rights owned by The Toledo Consolidated Street Railway Company, as aforesaid, and which are now owned by this defendant, this defendant is permitted to charge for the carrying of passengers upon its tracks in said system any sum not exceeding five cents (5¢) per passenger.

8. That for some time prior to the 8th day of January, 1912, the city of Toledo, through its proper officers, and this defendant had been engaged in negotiations looking towards the granting by the city of Toledo to this defendant and the acceptance by this defendant of a new franchise or grant covering the entire street railway system and the operation thereof within the city of Toledo; that prior to said date, this defendant had acquired other street railway lines in the city of Toledo, in addition to those hereinbefore described as having formerly belonged to The Toledo Consolidated Street Railway Company, and it was deemed advisable by the city of Toledo and this defendant that one street railway franchise be agreed upon, under and by virtue of which all other and previous franchises should be repealed, and the entire street railway system in the city of Toledo be governed by one new franchise.

That while said negotiations were pending, and on or about said 8th day of January, 1912, upon the request of the then mayor of the city of Toledo, defendant made certain voluntary concessions in the amounts of fare which it would temporarily charge for the transportation of passengers in the city of Toledo over its system, pending the negotiations between the city of Toledo and this defendant, with reference to said new franchise that said rates of fare so temporarily conceded by this defendant were, as follows: Three cents (3¢) per passenger between the hours of 5:30 a. m. and 7:30 a. m. and 4:30 p. m. and 6:30 p. m., upon tender being made of the exact fare, or

at the rate during said hours of five (5) tickets for fifteen cents (15¢), and during the remaining hours, at the rate of six (6) tickets for twenty-five cents (25¢), all pay passengers to have the right of transfer.

That in pursuance of said request of the mayor, this defendant put said rates of fare into operation, and has continued said rates of fare up to and including the present time, and is willing to continue said rates of fare for a reasonable time, pending the completion of the negotiations between the city of Toledo and this defendant with reference to said new franchise.

9. Defendant, further answering the bill, admits each and all of the allegations contained in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

10. As to paragraph 19, defendant denies that its franchises will expire before said 6th day of October, 1915, and admits the other allegations of said paragraph 19.

11. Defendant, further answering the bill, admits each and all of the allegations contained in paragraphs 20 and 21.

12. For answer to paragraph 22, defendant avers that if this court will grant an order restraining the city of Toledo from asserting, enforcing or attempting to enforce said ordinance passed July 26, 1911, and said ordinance passed November 24, 1913, that it will not be necessary to appoint a receiver herein.

Wherefore this answering defendant prays that its rights may be fully protected.

Rathbun Fuller,
Solicitor for defendant, The Toledo Railways & Light Company.

Northern District of Ohio, Western Division,
State of Ohio, County of Lucas, ss.

Frank R. Coates, being first duly sworn, deposes and says that he is the president of the defendant, The Toledo Railways & Light Company. duly authorized to make this affidavit and verify the foregoing answer; that he has read the foregoing answer, and that the allegations in said answer contained are true, except as to such allegations as are therein stated to be on information and belief, and as to each and all such allegations affiant believes them to be true.

Frank R. Coates

Sworn to before me and subscribed in my presence this 24th day of March, 1914.

(Seal) Forrest Jeffries.
Notary Public, Lucas County, Ohio.

Plaintiff's Exhibit No. 2G.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original answer of the Toledo Railways & Light Company, filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2G.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and the City of Toledo,

Defendants.

CROSS-BILL OF THE TOLEDO RAILWAYS & LIGHT COMPANY.

1. The defendant, The Toledo Railways & Light Company, says it is a corporation organized under the laws of Ohio, for the purpose, among other things, of engaging in the street car business in Toledo, Lucas County, Ohio.

2. This answering defendant says that the defendant, The City of Toledo, is a municipal corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Ohio, and said defendant, The City of Toledo, has heretofore been made a party defendant to this

cause upon the bill and amendment and supplement thereto of the plaintiffs herein, and said defendant has been duly served with process in this cause.

3. This defendant is the owner of the entire street railway system, and of all of the street railways property, located and operated in the City of Toledo, Lucas County, Ohio, said property consisting of many miles of street railway tracks and the overhead construction necessary to operate the same by electricity, street cars, power houses, car barns, real estate and a large amount of personal property used as a part of and in connection with said street railway system and property, and in the operation thereof.

This defendant also owns and operates a large number of franchises or grants issued and granted to it or acquired by this defendant from others to whom such franchises and grants have heretofore been given and granted by the defendant, The City of Toledo.

Said street railway system and property consists of and is the result of the assembling, acquiring and merging of numerous smaller street railway systems and properties theretofore created and existing in the City of Toledo, which former street railway systems and properties were operating over and upon the streets and public ways of the City of Toledo under and by virtue of numerous franchises and grants theretofore given and granted by the City of Toledo to the then respective owners of said several street railway systems and properties.

4. This defendant further says that on and prior to the 6th day of October, 1890, one The Toledo Consolidated Street Railway Company, a corporation then duly organized and existing under the laws of the State of Ohio, as a street railway company, was the owner of, in possession of, and operating a street railway system in said city of Toledo, under and by virtue of certain grants and franchises from the city of Toledo then owned by said The Toledo Consolidated Street Railway Company.

That on or about the 13th day of March, 1890, the common council of the city of Toledo duly passed an ordinance granting to William A. Collins, trustee, his successors in trust and assigns, the right to construct, maintain and operate a street railroad along certain streets and public ways in said city of Toledo; that thereafter, to-wit, on or about the 6th day of October, 1890, said common council of the city of Toledo duly passed an ordinance granting to said William A. Collins, trustee, his successors, heirs and assigns, the right to construct, maintain and operate an extension of the lines of street rail-

way theretofore authorized to be constructed in the ordinance hereinbefore mentioned as having been passed on the 13th day of March, 1890.

The following is a true and correct copy of said ordinance so passed on October 6, 1890:

"AN ORDINANCE

"To grant to William A. Collins, trustee, his successors and assigns, the right to construct, maintain and operate a double track, standard gauge extension of the authorized line of street railway from Front street along Bridge street, the bridge over the Maumee river, Cherry street to Summit street to Monroe street, and to authorize the transfer by said trustee of his rights and franchises.

"Whereas, William A. Collins, Trustee, has duly made application in writing to the common council of the city of Toledo, for leave to himself, his successors and assigns, to construct, maintain and operate an extension of the lines of street railway heretofore authorized to be constructed by him, by an ordinance entitled, 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, as follows:

"Commencing at the point where said line of street railway authorized by and in said ordinance intersects Bridge street on Front street, thence along said Bridge street to the bridge crossing the Maumee river, between the northwesterly end of Bridge street and the southeasterly end of Cherry street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry Street Bridge,' to Cherry Street, thence, along Cherry street to Summit street, and thence along Summit street to Monroe street, as a double track, standard gauge street railway, and has obtained and produced to the common council the written consent therefor of the owners and holders of more than one-half of the feet front of the lots and lands abutting on said Bridge street between Front street and the channel of Maumee river, and on Cherry street between the channel of the Maumee river and Summit street, and on Summit street between Cherry street and Monroe street, and the common council deem such extension beneficial to the public:

"Therefore:

"Section 1. Be it ordained by the common council of the city of Toledo that William A. Collins, trustee, his successors, heirs and assigns, be and they hereby are granted permission and are authorized and empowered to construct, maintain and

operate an extension of the line of street railway heretofore authorized by said ordinance as aforesaid, as follows: 'Commencing at the point where said line of street railway authorized by and in said ordinance intersects Bridge street on Front street, thence along said Bridge street to the bridge crossing the Maumee river between the northwesterly end of Bridge street and the southeasterly end of Cherry street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry Street Bridge,' to Cherry street, thence along Cherry Street to Summit Street, and thence along Summit Street to Monroe Street, as a double track, standard gauge street railway, together with the necessary tracks, turnouts, sidetracks, turntables, switches, curves and appliances, and this grant and permission shall be and remain in force for the period of twenty-five years from and after the date of the passage of this ordinance, provided that shall be subject to all and singular the provisions of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and also subject to the provisions of an ordinance entitled 'An ordinance to authorize the use of streets, alleys, and other public places in the city of Toledo for the purpose of constructing and operating electric mains, wires and appliances for the propelling and operating of street cars,' passed November 25, 1889, so far as said ordinances or either thereof may be applicable hereto and not inconsistent herewith; and

"Provided, further, that said William A. Collins, trustee, his successors, heirs or assigns, shall in constructing, maintaining and operating said extension of said street railway, as aforesaid, use and occupy only the existing street railway tracks on said streets and said bridge, and for the purpose the said William A. Collins, trustee, his successors and assigns, are hereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front street along Bridge street and across the bridge and along Cherry street to Summit street, and along Summit street from Cherry street to Monroe street, in all respects under and in pursuance of an ordinance of the city of Toledo, entitled 'An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its charters', passed November 9, 1885, and said trustee, his successors and assigns, shall enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, successors and assigns, and the said The Toledo Consolidated Street Railway Company shall during the term of this grant

mutually transfer passengers from the lines of the other for a single fare of five cents for a continuous passage over said railroads, said fare to be paid to and collected by the operators of the railroad upon which such passenger shall first take passage.

"Section 2. The cars upon said extension of said railway and over and along said route above described shall be propelled and operated by means of electricity, transmitted along wires or used by means of storage batteries or other devices of electricity as a motive power, compressed air, gas or cable, used as a motive power, directly or indirectly under such rules, regulations and conditions as the common council have heretofore or may hereafter prescribe, and said trustee, his successors, heirs and assigns, shall place and continue on said extension of said railway good cars with modern improvements for the convenience and comfort of passengers, and shall run cars on said extension on such schedule of time as public convenience may in the opinion of the council require.

"Section 3. Said trustee, his seccessors, heirs or assigns, shall not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same may now or hereafter be constructed, or from any point on its line as it shall be extended to any point on said extension.

"Section 4. The work of the construction of said extension of said street railway shall be commenced as soon as practicable after the passage of this ordinance and shall be completed and in operation on or before the 13th day of March, 1891.

"Section 5. The said trustee, his successors, heirs and assigns, shall construct said extension and all appliances and structures appertaining thereto, under the direction of the city civil engineer and subject to the approval of the city civil engineer and city electrician and when the city shall deem it necessary to grade or regrade, pave or repave or otherwise improve or repair said streets, or any part thereof, the said trustee, his successors, heirs or assigns, shall improve or repair in such manner and with such materials as the common council may direct such portion of all that part of said streets which lies between the outer rails of said tracks, whether the same may be constructed by the said trustee, his successors, heirs or assigns, or leased or purchased from others, as the common council of said city may from time to time by ordinance prescribe, or pay to the said city the cost of so improving or repairing the same.

"Section 6. If said trustee, his successors, heirs or assigns, shall fail or refuse to comply with the conditions of this

ordinance, or of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, or of the general ordinances of the city of Toledo regulating the operations of street railways and amendments existing or hereafter made thereto so far as the same are applicable and not inconsistent with the conditions of this ordinance, the rights and privileges hereby granted shall be deemed forfeited and the city of Toledo shall have the right to re-enter and take possession of the same to the exclusion of the said trustee, his successors or assigns.

"Section 7. If said William A. Collins, trustee, shall assign and transfer to The Ironville Street Railway Company, of Toledo, Ohio, all his rights, title, claims, interest and franchises heretofore granted to said trustee, his successors or assigns, by said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and in this ordinance, and said The Ironville Street Railway Company shall file with the city clerk of the city of Toledo, its acceptance in writing of the terms and conditions of said ordinance passed March 13, 1890, and of this ordinance and said The Ironville Street Railway Company shall construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then all the rights and privileges and franchises heretofore granted and authorized in said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and in this ordinance, shall pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner and to the same effect as though each and every of the grants in said ordinance mentioned had been therein made directly to said Company, its successors and assigns, and said company, its successors and assigns, shall in all respects be governed by the terms, conditions and limitations of said two ordinances.

"Section 8. This ordinance shall take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, his successors, heirs or assigns, with the clerk of said city of a written acceptance of the terms and conditions hereof, and upon the filing by said The Toledo Consolidated Street Railway Company with the said clerk of said city of a written consent to the transfer of passengers, as hereinbefore provided for.

"Section 9. All ordinances and parts of ordinances inconsistent herewith are hereby repealed."

Said ordinance, passed on the 6th day of October, 1890, as aforesaid, provided, among other things, that said William A. Collins, his successors and assigns, are thereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front Street along Bridge Street and across the bridge and along Cherry Street to Summit Street and along Summit Street from Cherry Street to Monroe Street, in all respects under and in pursuance of an ordinance of the city of Toledo, entitled "An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its charters," passed November 9, 1885; and it was further provided in said ordinance that said trustee, his successors and assigns, should enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, his successors and assigns, and the said The Toledo Consolidated Street Railway Company should, during the term of the grant of said ordinance passed on October 6, 1890, mutually transfer passengers from the lines of the other for a single fare of five cents (5¢) for a continuous passage over said railroads, said fare to be paid to and collected by the operators of the railroad upon which such passenger shall first take passage.

Said ordinance further provided that said trustee, his successors, heirs and assigns, should not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same might then or thereafter be constructed, or from any point on its line as it should thereafter be extended to any point on said extension.

It was further provided in said ordinance that if said William A. Collins, trustee, should assign and transfer to The Ironville Street Railway Company, of Toledo, Ohio, all his rights, title, claims, interest and franchises theretofore granted to said trustee, his successors and assigns, by said ordinance, and said The Ironville Street Railway Company should file with the city clerk of the city of Toledo its acceptance in writing of the terms and conditions of said ordinance passed March 13, 1890, and of said ordinance passed October 6, 1890, said The Ironville Street Railway Company should construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then, and in that event, all the rights, privileges and franchises theretofore granted by

said two ordinances to said William A. Collins, trustee, his successors and assigns, should thereby pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner and to the same effect as though each and every of the grants in said ordinances had been made directly to said company, its successors and assigns; and it was further provided that said ordinance, passed October 6, 1890, should take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, of a written acceptance of the terms and conditions of said ordinance, and upon the filing by said The Toledo Consolidated Street Railway Company with the said Clerk of the city of a written consent to the transfer of passengers, as thereinbefore provided for.

That said ordinance was duly approved by the mayor and published, as required by law, and the written acceptance of William A. Collins, trustee, above referred to, was duly filed with the clerk of said city on or about the 13th day of October, 1890, and said The Toledo Consolidated Street Railway Company duly filed its acceptance with the city clerk of said City of Toledo on or about the 13th day of October, 1890, in words and figures, as follows, viz:

"TO THE HONORABLE COMMON COUNCIL OF THE CITY OF TOLEDO.

Gentlemen:

In pursuance of said ordinance, The Toledo Consolidated Street Railway Company hereby agrees to transfer passengers to and from the lines of its road in accordance with the provisions of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, his successors or assigns, the right to construct, maintain and operate a double track standard gauge extension of the authorized line of street railway from Front street along Bridge street, the bridge over the Maumee river, Cherry street and Summit street to Monroe street, and to authorize the transfer by said trustee of his rights and franchises,' passed October 6, 1890.

In Witness Whereof the said The Toledo Consolidated Street Railway Company has caused its name to be signed hereto by Albion E. Lang, its vice-president, and its seal to be affixed by Chas. L. Wight, its secretary.

The Toledo Consolidated Street Railway Company,

By (Signed) A. E. Lang, Vice-President.

Attest

(Seal.) (Signed) Chas. L. Wight, Secy."

5. This defendant further says that, in pursuance of the terms of said ordinance last above set forth, said William A. Collins, trustee, did thereafter assign all of his right, title and interest in and to said ordinances and each of them to said The Ironville Street Railway Company, and that said Company thereupon filed its written acceptance of the terms thereof with the clerk of the city of Toledo, all as provided in said ordinance, and said The Ironville Street Railway Company did thereupon construct, maintain and operate a street railway upon the route described in said ordinance passed on the 13th day of March, 1890, and in said ordinance passed on the 6th day of October, 1890, all within the time and in the manner as provided for in said ordinance.

6. That immediately upon the commencement of the operation of said street railway system by The Ironville Street Railway Company, said The Ironville Street Railway Company and said The Toledo Consolidated Street Railway Company at once entered into and operated a system of transferring of passengers between their respective lines, all as provided for in said ordinance passed October 6, 1890, and continued to operate said system of transfer of passengers until all of said street railway property of said The Ironville Street Railway Company was thereafter purchased, acquired and taken over by The Toledo Consolidated Street Railway Company.

That this defendant is the successor in title to all of the street railways, properties and franchises of every name and nature theretofore owned, maintained or operated by The Toledo Consolidated Street Railway Company and The Ironville Street Railway Company, and is now the owner of all of the rights, privileges and property granted by the city of Toledo to said William A. Collins, trustee, The Ironville Street Railway Company and The Toledo Consolidated Street Railway Company, under and by virtue of the terms and provisions of said two ordinances aforesaid, passed on the 13th day of March, 1890, and the 6th day of October, 1890.

7. That at the time of the passage of said ordinance to William A. Collins, trustee, under date of October 6, 1890, The Toledo Consolidated Street Railway Company owned and operated, under franchises theretofore granted by the city of Toledo, the principal street railway system then existing in the city of Toledo; that said system so owned by The Toledo Consolidated Street Railway Company at said time, included, among others, the following principal lines and streets in the city of Toledo, viz:

The Summit Street and Broadway line, extending from Bay View Park to Walbridge Park.

The lines upon Monroe street, Dorr street, Adams street, Ashland avenue, Collingwood avenue, Cherry street, St. Clair street, with the extensions thereof, Superior street, and extensions thereof, Erie street, and the extensions thereof, Michigan street and extensions thereof.

All street railway lines then crossing the Maumee river in said city, and all street railway lines on the east side of the Maumee river, with the exception of the line owned by The Ironville Street Railway Company.

And all other lines in the city of Toledo, with the exception of what is now known as the Bancroft Belt Line, the Huron Street line, the South Street line, and the Indiana Avenue line and Stickney Avenue line.

That under and by virtue of the terms and provisions of said ordinance passed by the common council of the city of Toledo, under date of October 6, 1890, the franchises and rights theretofore granted by the city of Toledo and then owned by The Toledo Consolidated Street Railway Company, under and by virtue of which it was maintaining and operating its said system on said 6th day of October, 1890, were continued and extended by said grant contained in said ordinance passed October 6, 1890, until and including the 6th day of October, 1915, and by reason thereof, the right of this defendant to construct, maintain and operate its street railway tracks on all portions of said system originally owned by The Toledo Consolidated Street Railway Company is in full force and effect, and will continue to be in full force and effect until and including the 6th day of October, 1915.

8. That under and by virtue of the terms and provisions of the franchises and rights owned by The Toledo Consolidated Street Railway Company, as aforesaid, and which are now owned by this defendant, this defendant is permitted to charge for the carrying of passengers upon its tracks in said system any sum not exceeding five cents (5¢) per passenger.

9. That for some time prior to the 8th day of January, 1912, the city of Toledo, through its proper officers, and this defendant had been engaged in negotiations looking towards the granting by the city of Toledo to this defendant and the acceptance by this defendant of a new franchise or grant covering the entire street railway system and the operation thereof within the city of Toledo; that prior to said date, this defendant had acquired other street railway lines in the city of Toledo, in addition to those hereinbefore described as having formerly belonged to The Toledo Consolidated Street Railway Company, and it was deemed advisable by the city of Toledo and this defendant that one street railway franchise

be agreed upon, under and by virtue of which all other and previous franchises should be repealed, and the entire street railway system in the city of Toledo be governed by one new franchise.

That while said negotiations were pending, and on or about said 8th day of January, 1912, upon the request of the then mayor of the city of Toledo, this defendant made certain voluntary concessions in the amounts of fare which it would temporarily charge for the transportation of passengers in the city of Toledo over its system, pending the negotiations between the city of Toledo and this defendant, with reference to said new franchise; that said rates of fare so temporarily conceded by this defendant were, as follows: Three cents (3¢) per passenger between the hours of 5:30 a. m. and 7:30 a. m. and 4:30 p. m. and 6:30 p. m. upon tender being made of the exact fare, or at the rate during said hours of five (5) tickets for fifteen cents (15¢) and during the remaining hours, at the rate of six (6) tickets for twenty-five cents (25¢), all pay passengers to have the right of transfer.

That in pursuance of said request of the mayor, this defendant put said rates of fare into operation, and has continued said rates of fare up to and including the present time, and is willing to continue said rates of fare for a reasonable time, pending the completion of the negotiations between the city of Toledo and this defendant with reference to said new franchise.

10. That this defendant did immediately after the passage of said ordinance of November 24, 1913, notify the defendant, The City of Toledo, that it could not operate its cars under the terms and provisions thereof, and asked the mayor and council of the City of Toledo to repeal said ordinance, which request the City of Toledo and its officials refused and failed to grant and comply with. That at numerous times thereafter this defendant requested the City of Toledo and its said officials to suspend the operation of said ordinance, or to repeal the same, pending the negotiations between this defendant and the defendant, The City of Toledo, with reference to a new franchise for the maintenance and operation of its street railway system in the City of Toledo, but notwithstanding the fact that negotiations are now actively pending and have been so pending ever since the adoption of the ordinance last aforesaid, the City of Toledo, through its council, on Monday, March 23, 1914, declined and refused to suspend the operation of said ordinance.

11. Notwithstanding the fact that this defendant has, holds and owns a number of franchises and grants from the defendant, the City of Toledo, permitting it to operate street cars over a large number of the streets of said defendant, The

City of Toledo, and which said last mentioned grants and franchises will not expire on March 27, 1914, or for a long period of time thereafter, the defendant, The City of Toledo, through its officers, agents and employes give out and state that said defendant, the City of Toledo, and said officers, agents and employes, will enforce the terms and provisions of said ordinance passed on November 24, 1913, after the 27th day of March, 1914; this defendant further says that said defendant, The City of Toledo, its said officers, agents and employes, will wrongfully and falsely inform and instruct the public and the persons and passengers riding and attempting to ride upon the cars of this defendant in the City of Toledo, after March 27, 1914, that such persons and passengers will each be entitled to ride upon said cars for a three cent fare, and that they, said officers, agents and employes of the defendant, the City of Toledo, will protect said persons and passengers in their alleged rights to ride for three cent fares, as aforesaid, and said officers, agents and employes are now publicly advising, through the newspapers and otherwise, that all persons and passengers desiring to ride upon said cars after March 27, 1914, shall refuse to pay more than a three cent fare each.

12. That this defendant is now carrying upon its cars about one hundred twenty-five thousand (125,000) pay passengers per day, and the service furnished by this defendant is the only public means of transporting passengers through or over the streets of the defendant, The City of Toledo.

13. That this defendant, The Toledo Railways & Light Company, cannot and should not, for the reasons stated herein, carry passengers for the rate fixed in said ordinance passed on November 24, 1913, nor should it be subjected to pay the rental of Two Hundred and Fifty ($250.00) Dollars per day provided for in said last mentioned ordinance and said ordinance passed July 26, 1911.

14. That this defendant further says that said ordinance passed on November 24, 1913, is illegal, void and of no effect, for the further reason that the same did not and could not go into effect during the term of office of the respective members of the council which passed said ordinance or during the term of office of the mayor who signed said ordinance, nor did or could the same go into effect within the time required by law.

15. That if this defendant, The Toledo Railways & Light Company, refuses to accept three cent fares, as aforesaid, after March 27, 1914, the persons and passengers riding and attempting to ride upon the cars of this defendant will, under the advice of the officers, agents and employes of the

defendant, The City of Toledo, refuse to pay the fare to which this defendant is entitled, and confusion, trouble, annoyance and great loss, injury and damage will be suffered by this defendant.

16. That the City of Toledo, is attempting, by its officers and agents, through the terms and provisions of the ordinances passed on November 24, 1913, and July 26, 1911, respectively, to force upon the defendant, The Toledo Railways & Light Company, an unjust, arbitrary and confiscatory rate of fare and rental, and said officers, agents and employes give out, state and threaten that they will either force this defendant, The Toledo Railways & Light Company, to accept the terms and provisions of said two ordinances, or compel this defendant to cease operating its cars in the City of Toledo after March 27, 1914; that this defendant cannot, for the reasons stated herein, accept the rates of fare and the terms and provisions of the ordinances of November 24, 1913, and July 26, 1911, and to stop the operation of its cars after March 27, 1914, would paralyze the business and social activity of the City of Toledo, greatly inconvenience and injure the public, and be of great and irreparable damage to this defendant.

Wherefore, this defendant respectfully prays and asks for an order and temporary injunction herein against the City of Toledo, its officers, agents, employes and all other parties and persons whomsoever to whom notice thereof is given, enjoining and restraining them and each of them, until the further order of this court, from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo, on July 26, 1911, hereinbefore described, and relating to the payment of two hundred and fifty ($250.00) Dollars per day rental by this defenadant, and from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on November 24, 1913, heretofore described herein, relating to the fares to be charged by this defendant after March 27, 1914, and such other order in the premises as to the court may seem proper, and that upon the final hearing of this cause such temporary injunction and order may be made perpetual, said ordinances declared null and void and of no effect; and this defendant further prays for all other relief to which it may be entitled by reason of the premises.

Rathbun Fuller,
Solicitor for the Defendant, The Toledo Railways & Light Company.

Northern District of Ohio, Western Division, State of Ohio, County of Lucas, ss.

Frank R. Coates, being first duly sworn, deposes and says that he is the president of the defendant, The Toledo Railways & Light Company, duly authorized to make this affidavit and verify the foregoing cross-bill; that he has read the foregoing cross-bill, and that the allegations in said cross-bill contained are true.

Frank R. Coates.

Sworn to before me and subscribed in my presence this 24th day of March, 1914.

Fred S. Zink,

(Seal.) Notary Public, Lucas County, Ohio.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Cross Bill of The Toledo Railways & Light Company, filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk.

(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2H.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners, Doing Business Under The Firm Name and Style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

MOTION OF PLAINTIFFS FOR TEMPORARY INJUNCTION.

Now come the plaintiffs, and respectfully moves this honorable court for an order and temporary injunction herein against the city of Toledo, its officers, agents, employes, and all other parties and persons whomsoever, enjoining and restraining them, and each of them, until the further order of this court, from asserting, enforcing, or attempting to assert and enforce any of the terms and provisions of a certain ordinance passed by the council of the city of Toledo on July 26, 1911, described in the bill heretofore filed herein, relating to the payment of two hundred fifty dollars ($250.00) per day rental by The Toledo Railways & Light Company, and from asserting, enforcing, or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the city of Toledo on November 24, 1913, described in the bill heretofore filed herein, relating to the fares to be charged by The Toledo Railways & Light Company after March 27th, 1914, and for such further and other order in the premises as may effectually prevent the assertion, enforcement or the attempted assertion or enforcement of said ordinances, or either of them, or of any of their respective terms and provisions.

Chas. A. Frueauff,
E. J. Marshall,
Thos. H. Tracy.
Solicitors for Plaintiffs.

Plaintiffs' Exhibit No. 21.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion of the plaintiffs for Temporary Injunction, filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September, A. D. 1914 and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 21.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners, Doing Business Under The Firm Name and Style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

MOTION OF THE TOLEDO RAILWAYS & LIGHT COMPANY FOR TEMPORARY INJUNCTION.

Now comes the defendant The Toledo Railways & Light Company and respectfully moves this honorable court for an order and temporary injunction herein against the city of Toledo, its officers, agents, employes, and all other parties and persons whomsoever, enjoining and restraining them, and each of them, until the further order of this court, from asserting, enforcing or attempting to assert and enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on July 26, 1911, described in the cross-bill heretofore filed herein, relating to the payment of two hundred fifty dollars ($250.00) per day rental by The

Toledo Railways & Light Company, and from asserting, enforcing, or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on November 24, 1913, described in the cross-bill heretofore filed herein, relating to the fares to be charged by The Toledo Railways & Light Company after March 27th, 1914, and for such further and other order in the premises as may effectually prevent the assertion, enforcement, or the attempted assertion or enforcement of said ordinances, or either of them, or of any of their respective terms and provisions.

Rathbun Fuller,
Solicitor for The Toledo Railways
& Light Company.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion of The Toledo Railways & Light Company for Temporary Injunction, filed March 24, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the ..... year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2J.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners, Doing Business Under The Firm Name and Style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Now come the plaintiffs and move the court for a temporary restraining order herein restraining and enjoining the defendant the City of Toledo, its agents, officers and employes and all other persons having notice of such order from interfering or attempting to interfere by legal proceedings or otherwise, with the possession and control which this court now has or may hereafter take through its officers, of the property and assets of the defendant The Toledo Railways & Light Company, and of the subject matter of these proceedings, and from enforcing or attempting to enforce by any legal proceedings the ordinances described in the bill herein, or either of them.

Charles A. Frueauff,
E. J. Marshal,
Thos. H. Tracy,
Solicitors for Plaintiffs.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion for temporary restraining order, filed March 27, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2K.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

No. 86.

Henry L. Doherty, Charles T. Brown, and Frank W. Frueauff, partners, ding business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

AMENDED CROSS-BILL OF THE TOLEDO RAILWAYS LIGHT & COMPANY.

1. By leave of Court first obtained, defendant, The Toledo Railways & Light Company, presents this its amended cross-bill herein, and respectfully shows to the court as follows:

2. The defendant, The Toledo Railways & Light Company, says it is a corporation organized under the laws of Ohio, for the purpose, among other things, of engaging in the street car business in Toledo, Lucas County, Ohio.

3. This answering defendant says that the defendant, The City of Toledo, is a municipal corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Ohio, and said defendant, The City of Toledo, has heretofore been made a party defendant to this cause upon the bill and amendment and supplement thereto of the plaintiffs herein, and said defendant has been duly served with process in this cause.

4. This defendant is the owner of the entire street railway system, and of all of the street railway property, located and operated in the City of Toledo, Lucas County, Ohio, said property consisting of many miles of street railway tracks and the overhead construction necessary to operate the same by electricity, street cars, power houses, car barns, real estate and a large amount of personal property used as a part of and in connection with said street railway system and property, and in the operation thereof.

This defendant also owns and operates a large number of franchises or grants issued and granted to it or acquired by this defendant from others to whom such franchises and grants have heretofore been given and granted by the defendant, The City of Toledo.

Said street railway system and property consists of and is the result of the assembling, acquiring and merging of numerous smaller street railway systems and properties theretofore created and existing in the City of Toledo, which former street railway systems and properties were operating over and upon the streets and public ways of the City of Toledo, under and by virtue of numerous franchises and grants theretofore given and granted by the City of Toledo to the then respective owners of said several street railway systems and properties.

5. This defendant further says that on and prior to the 6th day of October, 1890, one The Toledo Consolidated Street Railway Company, a corporation then duly organized and existing under the laws of the State of Ohio as a street railway company, was the owner of, in possession of, and operating a street railway system in said City of Toledo, under and by virtue of certain grants and franchises from the City of Toledo, then owned by said The Toledo Consolidated Street Railway Company;

That on or about the 13th day of March, 1890, the common council of the city of Toledo duly passed an ordinance granting to Wiliam A. Collins, trustee, his successors in trust and assigns, the right to construct, maintain and operate a street railroad along certain streets and public ways in said city of Toledo; that thereafter, to-wit, on or about the 6th day of October, 1890, said common council of the city of Toledo duly passed an ordinance granting to said William A. Collins, trustee, his successors, heirs and assigns, the right to construct, maintain and operate an extension of the lines of street railway theretofore authorized to be constructed in the ordinance hereinbefore mentioned as having been passed on the 13th day of March, 1890.

The following is a true and correct copy of said ordinance so passed on October 6, 1890:

"AN ORDINANCE

"To grant to William A. Collins, trustee, his successors and assigns, the right to construct, maintain and operate a double track standard gauge extension of the authorized line of street railway from Front Street along Bridge Street, the bridge over the Maumee river, Cherry street to Summit street to Monroe street, and to authorize the transfer by said trustee of his rights and franchises.

"Whereas, William A. Collins, trustee, has duly made application in writing to the common council of the city of Toledo, for leave to himself, his successors and assigns to construct, maintain and operate an extension of the lines of street railway heretofore authorized to be constructed by him, by an ordinance entitled, 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, as follows:

"Commencing at a point where said line of street railway authorized by and in said ordinance intersects Bridge Street on Front Street, thence along said Bridge Street to the bridge crossing the Maumee River, between the northwesterly end of Bridge street and the southeasterly end of Cherry street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry Street Bridge,' to Cherry Street, thence along Cherry Street to Summit Street, and thence along Summit Street to Monroe Street, as a double track, standard gauge street railway, and has obtained and produced to the common council the written consent therefor of the owners and holders of more than one-half of the feet front of the lots and lands abutting on said Bridge street between Front street and the channel of Maumee river, and on Cherry street between the channel of the Maumee river and Summit street, and on Summit street between Cherry street and Monroe street, and the common council deem such extension beneficial to the public;

"Therefore:

"Section 1. Be it ordained by the common council of the City of Toledo that William A. Collins, trustee, his successors, heirs and assigns, be and they hereby are granted permission and are authorized and empowered to construct, maintain and operate an extension of the line of street railway heretofore authorized by said ordinance, as aforesaid, as follows: Commencing at the point where said line of street railway authorized by and in said ordinance intersects Bridge street on Front street, thence along said Bridge Street to the bridge crossing the Maumee River between the northwesterly end of Bridge street and the southeasterly end of Cherry street, thence along and across said bridge across the Maumee river, commonly called the 'Cherry street Bridge,' to Cherry street, thence along Cherry Street to Summit street, and thence along Summit street to Monroe street, as a double track, standard gauge street railway, together with the necessary tracks, turnouts, sidetracks, turntables, switches, curves and appliances, and this grant and permission shall be and remain in force for the period of twenty-five years from and after the date of the

passage of this ordinance provided that shall be subject to all and singular the provisions of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo.' passed March 13, 1890, and also subject to the provisions of an ordinance, entitled 'An ordinance to authorize the use of streets, alleys, and other public places in the city of Toledo for the purpose of constructing and operating electric mains, wires and appliances for the propelling and operating of street cars,' passed November 25, 1889, so far as said ordinances or either thereof may be applicable hereto and not inconsistent herewith; and

"Provided, further, that said William A. Collins, trustee, his successors, heirs or assigns, shall in constructing, maintaining and operating said extension of said street railway, as aforesaid, use and occupy only the existing street railway tracks on said streets and said bridge, and for the purpose the said William A. Collins, trustee, his successors and assigns, are hereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front Street along Bridge street and across the bridge and along Cherry street to Summit street and along Summit street from Cherry street to Monroe street, in all respects under and in pursuance of an ordinance to grant to The Toledo entitled 'An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its charters,' passed November 9, 1885, and said trustee, his successors and assigns, shall enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, successors and assigns, and the said The Toledo Consolidated Street Railway Company shall during the term of this grant mutually transfer passengers from the lines of the other for a single fare of five cents for a continuous passage over said railroads, said fare to be paid to and collected by the operators of the railroad upon which such passenger shall first take passage.

"Section 2. The cars upon said extension of said railway and over and along said route above described shall be propelled and operated by means of electricity, transmitted along wires or used by means of storage batteries or other devices of electricity as a motive power, compressed air, gas or cable, used as a motive power, directly or indirectly, under such rules, regulations and conditions as the common council have heretofore or may hereafter prescribe, and said trustee, his successors, heirs and assigns, shall place and continue on said extension of said railway good cars with modern im-

provements for the convenience and comfort of passengers, and shall run cars on said extension on such schedule of time as public convenience may in the opinion of the council require.

"Section 3. Said trustee, his successors, heirs or assigns, shall not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same may now or hereafter be constructed or from any point on its line as it shall be extended to any point on said extension.

"Section 4. The work of the construction of said extension of said street railway shall be commenced as soon as practicable after the passage of this ordinance and shall be completed and in operation on or before the 13th day of March, 1891.

"Section 5. The said trustee, his successors, heirs and assigns, shall construct said extension, and all appliances and structures appertaining thereto, under the direction of the city civil engineer and subject to the approval of the city civil engineer and city electrician and when the city shall deem it necessary to grade or regrade, pave or repave or otherwise improve or repair said streets, or any part thereof, the said trustee, his successors, heirs or assigns, shall improve or repair in such manner and with such materials as the common council may direct such portion of all that part of said streets which lies between the outer rails of said tracks, whether the same may be constructed by the said trustee, his successors, heirs or assigns, or leased or purchased from others, as the common council of said city may from time to time by ordinance prescribe, or pay to the said City the cost of so improving or repairing the same.

"Section 6. If said trustee, his successors, heirs or assigns shall fail or refuse to comply with the conditions of this ordinance, or of an ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo' passed March 13, 1890, or of the general ordinances of the city of Toledo regulating the operations of street railways and amendments existing or hereafter made thereto so far as the same are applicable and not inconsistent with the conditions of this ordinance, the rights and privileges hereby granted shall be deemed forfeited and the city of Toledo shall have the right to re-enter and take possession of the same to the exclusion of the said trustee, his successors or assigns.

"Section 7. If said William A. Collins, trustee, shall assign and transfer to The Ironville Street Railway Company,

of Toledo, Ohio, all his rights, title, claims, interest and franchises heretofore granted to said trustee, his successors or assigns, by said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, per . 'ssion to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo,' passed March 13, 1890, and in this ordinance, and said The Ironville Street Railway Company shall file with the city clerk of the city of Toledo, its acceptance in writing of the terms and conditions of said ordinance and said The Ironville Street Railway Company shall construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then all the rights and privileges and franchises heretofore granted and authorized in said ordinance, entitled 'An ordinance to grant to William A. Collins, trustee, permission to construct, maintain and operate a street railway upon and along certain streets in the city of Toledo, passed March 13, 1890, and in this ordinance, shall pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner, and to the same effect as though each and every of the grants in said ordinance mentioned had been therein made directly to said company, its successors and assigns, and said company, its successors and assigns, shall in all respects be governed by the terms, conditions and limitations of said two ordinances.

"Section 8. This ordinance shall take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, his successors, heirs or assigns, with the clerk of said city of a written acceptance of the terms and conditions hereof, and upon the filing by said The Toledo Consolidated Street Railway Company with the said clerk of said city of a written consent to the transfer of passengers, as hereinbefore provided for.

"Section 9. All ordinances and parts of ordinances inconsistent herewith are hereby repealed."

Said ordinance, passed on the 6th day of October, 1890, as aforesaid, provided, among other things, that said William A. Collins, his successors and assigns, are thereby authorized and empowered to use and occupy the tracks of The Toledo Consolidated Street Railway Company from Front Street along Bridge Street and across the bridge and along Cherry Street to Summit street and along Summit street from Cherry street to Monroe Street, in all respects under and in pursuance of an ordinance of the city of Toledo, entitled "An ordinance to grant to The Toledo Consolidated Street Railway Company the right to construct its tracks and to extend its

charters," passed November 9, 1885; and it was further provided in said ordinance that said trustee, his successors and assigns, should enter into and operate a system of transferring of passengers with The Toledo Consolidated Street Railway Company, whereby said trustee, his successors and assigns, and the said The Toledo Consolidated Street Railway Company should, during the term of the grant of said ordinance passed on October 6, 1890, mutually transfer passengers from the lines of the other for a single fare of five cents (5¢) for a continuous passage over said railroads, said fare to be paid to and collected by the operators of the railroad upon which such passenger shall first take passage.

Said ordinance further provided that said trustee, his successors, heirs and assigns, should not charge passengers for a single fare for one continuous passage more than five cents (5¢) from any point on said road so extended to any other point on said line, as the same might then or thereafter be constructed or from any point on its line as it should thereafter be extended to any point on said extension.

It was further provided in said ordinance that if said William A. Collins, trustee, should assign and transfer to The Ironville Street Railway Company, of Toledo, Ohio, all his rights, title, claims, interest and franchises, theretofore granted to said trustee, his successors and assigns, by said ordinance, and said The Ironville Street Railway Company should file with the city clerk of the city of Toledo its acceptance in writing of the terms and conditions of said ordinance passed March 13, 1890, and of said ordinance passed October 6, 1890, said The Ironville Street Railway Company should construct and put in operation said line of street railway and extension thereof in all respects under and in pursuance of the terms and conditions of said two ordinances, then and in that event, all the rights, privileges and franchises theretofore granted by said two ordinances to said William A. Collins, trustee, his successors and assigns, should thereby pass to and vest in said The Ironville Street Railway Company, its successors and assigns, in all respects in the same manner, and to the same effect as though each and every of the grants in said ordinances had been made directly to said company, its successors and assigns, and it was further provided that said ordinance, passed October 6, 1890, should take effect and be in force from and after its passage and legal publication, and upon the filing by said William A. Collins, trustee, of a written acceptance of the terms and conditions of said ordinance, and upon the filing by said The Toledo Consolidated Street Railway Company with the said Clerk of the city of a written consent to the transfer of passengers, as thereinbefore provided for.

That said ordinance was duly approved by the mayor and published, as required by law, and the written acceptance of William A. Collins, trustee, above referred to, was duly filed with the clerk of said city or on about the 13th day of October, 1890, and said The Toledo Consolidated Street Railway Company duly filed its acceptance with the city clerk of said City of Toledo, on or about the 13th day of October, 1890, in words and figures as follows, viz:

"To the Honorable Common Council of the City of Toledo

Gentlemen:

In pursuance of said ordinance, The Toledo Consolidated Street Railway Company hereby agrees to transfer passengers to and from the lines of its road in accordance with the provisions of an ordinance, entitled "An ordinance to grant to William A. Collins, trustee, his successors or assigns, the right to construct, maintain and operate a double track standard gauge extension of the authorized line of street railway from Front Street along Bridge street, the bridge over the Maumee river, Cherry Street, and Summit street to Monroe street, and to authorize the transfer by said trustee of his rights and franchises," passed October 6, 1890.

In Witness Whereof the said The Toledo Consolidated Street Railway Company has caused its name to be signed hereto by Albion E. Lang, its vice-president, and its seal to be affixed by Chas. L. Wight, its secretary.

The Toledo Consolidated Street Railway Company,
By (Signed) A. E. Lang,
Vice-President.
Attest (Signed) Chas. L. Wight,
(Seal.) Secy."

6. This defendant further says that, in pursuance of the terms of said ordinance last above set forth, said William A. Collins, trustee, did thereafter assign all of his right, title and interest in and to said ordinances and each of them to said The Ironville Street Railway Company, and that said company thereupon filed its written acceptance of the terms thereof with the clerk of the city of Toledo, all as provided in said ordinance, and said The Ironville Street Railway Company did thereupon construct, maintain and operate a street railway upon the route described in said ordinance passed on the 13th day of March, 1890, and in said ordinance passed on the 6th day of October, 1890, all within the time and in the manner as provided for in said ordinance.

7. That immediately upon the commencement of the operation of said street railway system by The Ironville Street Railway Company, said The Ironville Street Railway Com-

pany and said The Toledo Consolidated Street Railway Company at once entered into and operated a system of transferring of passengers between their respective lines, all as provided for in said ordinance passed October 6, 1890, and continued to operate said system of transfer of passengers until all of said street railway property of said The Ironville Street Railway Company was thereafter purchased, acquired and taken over by The Toledo Consolidated Street Railway Company.

That this defendant is the successor in title of all of the street railways, properties and franchises of every name and nature theretofore owned, maintained or operated by The Toledo Consolidated Street Railway Company and The Ironville Street Railway Company, and is now the owner of all of the rights, privileges and property granted by the city of Toledo to said William A. Collins, trustee, The Ironville Street Railway Company and The Toledo Consolidated Street Railway Company, under and by virtue of the terms and provisions of said two ordinances aforesaid, passed on the 13th day of March, 1890, and the 6th day of October, 1890.

8. That at the time of the passage of said ordinance to William A. Collins, t ustee, under date of October 6, 1890, The Toledo Consolidated Street Railway Company owned and operated, under franchises theretofore granted by the city of Toledo, the principal street railway system then existing in the city of Toledo; that said system so owned by The Toledo Consolidated Street Railway Company at said time, included, among others, the following principal lines and streets in the city of Toledo, viz:

The Summit street and Broadway line, extending from Bay View Park to Walbridge Park.

The lines upon Monroe street, Dorr street, Adams street, Ashland Avenue. Collingwood avenue, Cherry Street, St. Clair street, with the extensions thereof, Superior street, and extensions thereof, Erie street, and the extensions thereof, Michigan street, and extensions thereof.

All street railway lines then crossing the Maumee river in said city, and all street railway lines on the east side of the Maumee river, with the exception of the line owned by The Ironville Street Railway Company.

And all other lines in the city of Toledo, with the exception of what is now known as the Bancroft Belt Line, the Huron Street line, the South Street line, and the Indiana avenue line and Stickney avenue line.

That under and by virtue of the terms and provisions of said ordinance passed by the common council of the city of Toledo, under date of October 6, 1890, the franchises and rights theretofore granted by the city of Toledo and then

owned by The Toledo Consolidated Street Railway Company, under and by virtue of which it was maintaining and operating its said system on said 6th day of October, 1890, were continued and extended by said grant contained in said ordinance passed October 6, 1890, until and including the 6th day of October, 1915, and by reason thereof, the right of this defendant to construct, maintain and operate its street railway tracks on all portions of said system originally owned by The Toledo Consolidated Street Railway Company is in full force and effect and will continue to be in full force and effect until and including the 6th day of October, 1915.

9. That under and by virtue of the terms and provisions of the franchises and rights owned by The Toledo Consolidated Street Railway Company, as aforesaid, and which are now owned by this defendant, this defendant is permitted to charge for the carrying of passengers upon its tracks in said system any sum not exceeding five cents (5¢) per passenger.

10. That for some time prior to the 8th day of January, 1912, the city of Toledo, through its proper officers, and this defendant had been engaged in negotiations looking towards the granting by the city of Toledo to this defendant and the acceptance by this defendant of a new franchise or grant covering the entire street railway system and the operation thereof within the city of Toledo; that prior to said date, this defendant had acquired other street railway lines in the city of Toledo, in addition to those hereinbefore described as having formerly belonged to The Toledo Consolidated Street Railway Company, and it was deemed advisable by the city of Toledo and this defendant that one street railway franchise be agreed upon, under and by virtue of which all other and previous franchises should be repealed, and the entire street railway system in the city of Toledo be governed by one new franchise.

That while said negotiations were pending, and on or about said 8th day of January, 1912, upon the request of the then mayor of the city of Toledo, this defendant made certain voluntary concessions in the amounts of fare which it would temporarily charge for the transportation of passengers in the city of Toledo over its system, pending the negotiations between the city of Toledo and this defendant, with reference to said new franchise; that said rates of fare so temporarily conceded by this defendant were, as follows: Three cents (3¢) per passenger between the hours of 5:30 a. m. and 7:30 a. m. and 4:30 p. m. and 6:30 P. M., upon tender being made of the exact fare, or at the rate during said hours of five (5) tickets for fifteen cents (15¢), and during the remaining hours, at the rate of six (6) tickets for twenty-five cents (25¢), all pay passengers to have the right of transfer.

That in pursuance of said request of the mayor, this defendant put said rates of fare into operation, and has continued said rates of fare up to and including the present time, and is willing to continue said rates of fare for a reasonable time, pending the completion of the negotiations between the city of Toledo and this defendant with reference to said new franchise.

11. On the 24th day of November, 1913, the Council of the City of Toledo passed an ordinance, entitled, "An ordinance pertaining to the Terms upon which The Toledo Railways & Light Company may operate its Street Cars on streets and public places in the City of Toledo, and authorizing the City Solicitor to take legal steps to enforce this Ordinance." The Mayor of the City of Toledo signed said ordinance on or about the 26th day of November, 1913, and the Clerk of said city is now causing, or will cause, said ordinance to be published, according to law. The following is a true and correct copy of said ordinance:

AN ORDINANCE.

"Pertaining to the terms upon which The Toledo Railways & Light Company may operate its street cars on streets and public places in the City of Toledo and authorizing the City Solicitor to take legal steps to enforce this ordinance.

"Whereas, the franchise rights of the Toledo Railways & Light Company, as the successor in title to operate street railways on certain streets in the City of Toledo, expire on the 27th day of March, 1914;

"Now, Therefore,

"Be It Ordained By the Council of the City of Toledo, State of Ohio:

"Sec. 1. That upon the following terms and conditions, and upon no other, consent, permission and authority are hereby granted to The Toledo Railways & Light Company to continue from day to day, only, after March 27th, 1914, to operate its cars on the streets and portions of streets whereon franchises expire on said March 27th, 1914, the operation to be in conjunction with all the rest of the street railway lines of The Toledo Railways & Light Company in the city of Toledo, so that the whole system will be operated as a unit and as one continuous system.

"Sec. 2. The operation of street cars after March 27th, 1914, on the streets and parts of streets whereon franchises expire on March 27th, 1914, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to March 27th, 1914, and shall be further subject to all the conditions imposed on the said Toledo Railways & Light Com-

pany by an ordinance passed July 26th, 1911, pertaining to the operation of street cars by The Toledo Railways & Light Company, and shall be further subject to the condition that the charge which said The Toledo Railways & Light Company may make and receive, for one continuous passage over the entire or any part of its street railway system, including the streets upon which franchises have expired, and those upon which franchises shall not have expired, shall not exceed the sum of three cents for each passenger, nor, the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled without extra charge to transfer from the route upon which he shall have paid his fare to any other route except in a substantially opposite direction on a route parallel or substantially parallel to said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations, passing the point of transfer, and that the service be regulated by the City of Toledo.

"Sec. 3. This ordinance is subject to the recovation or amendment in whole or in part, expressly or by implication, at any time at the will of council, and the council may at any time increase the obligations of the company for permission to operate upon said lines covered by said franchises, and the continuing by said company of the operation of its cars on lines covered by said franchises expiring March 27th, 1914, shall be deemed an acceptance of this ordinance and all the terms hereof.

"Sec. 4. In case The Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly and according to the tenor or effect thereof, then the City Solicitor be and he is hereby authorized and directed to take such legal action as may be proper and necessary to enforce the provisions of this ordinance or require the company to abandon the streets covered by the franchises above mentioned.

"Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

12. Said ordinance, passed by the Council on the 24th day of November, 1913, as aforesaid, provided, among other things, that the operation of street cars by this defendant after March 27th, 1914, on the streets and parts of streets whereon franchises expire on March 27th, 1914, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to March 27th, 1914, and shall be further subject to all the conditions imposed on this defendant by an ordinance passed July 26th, 1911, pertaining to the operation of

street cars by this defendant, and shall be further subject to the condition that the charge which this defendant may make and receive for one continuous passage over the entire or any part of its street railway system, including the streets upon which franchises have expired and those upon which franchises shall not have expired, shall not exceed the sum of three cents for each passenger, nor the sum of one cent for each child under eight years of age, children in arms free, and that any passenger demanding a transfer ticket at the time of paying his fare shall be entitled, without extra charge, to transfer from the route upon which he shall have paid his fare to any other route, except in a substantially opposite direction on a route parallel or substantially parallel to said first route, and to ride continuously to any point upon such second route within the limits of the City, providing he transfer to the first car with adequate accommodations, passing the point of transfer, and that the service be regulated by the City of Toledo. Said ordinance further provides that the continuing by this defendant of the operation of its cars on lines covered by said franchises expiring March 27th, 1914, shall be deemed an acceptance of said ordinance and all the terms thereof, and that, in case this defendant refuses or fails to comply with the terms of said ordinance promptly and according to the tenor or effect thereof, then that the City Solicitor be, and he thereby is, authorized, and directed to take such legal action as may be proper and necessary to enforce the provisions of said ordinance or require this defendant to abandon the streets covered by the franchises above mentioned.

13. The ordinance referred to in the preceding paragraph as having been passed on July 26th, 1911, was passed by the Council of the City of Toledo on said last named date, and was signed by the Mayor of the said city on the 3rd day of August, 1911, and thereafter was published by law. The following is a true and correct copy of said ordinance, passed on the 26th day of July, 1911:

"AN ORDINANCE

"Pertaining to the operation of street cars by The Toledo Railways & Light Company on streets and public places in the City of Toledo, for the operation of which franchises have heretofore expired, and on which cars are being operated without franchise rights, and fixing the terms for the future operation of cars thereon.

"Whereas, the franchise rights of the Toledo Railways & Light Company as the successors in title to operate street railways on the following-named streets in the City of Toledo, to-wit:

Adams Street, Michigan to Ashland Avenue.
Ashland Avenue, southeasterly terminus of Ashland Avenue to Collingwood Avenue.
Broadway, Morris to Colburn Street.
Cherry Street, Summit to Superior Street.
Cherry Street, Erie to Bancroft Street.
Collingwood Avenue, Ashland Avenue to Central Avenue.
Collingwood Avenue, Detroit Avenue to Cherry Street.
Detroit Avenue, west City Limits to Cherry Street.
Detroit, Avenue, Monroe Street to Delaware Avenue.
Dorr Street, Washington Street to City Line.
Delaware Avenue, Collingwood Avenue to Detroit Avenue.
Eleventh Street, Monroe to Washington Street.
East Broadway, Starr Avenue to Earl Street.
Lagrange Street, west City Line to Bancroft Street.
Monroe Street, Ontario Street to Auburn Avenue.
Maumee Avenue, North Railroad Avenue to Broadway.
Main Street (East Toledo), Front Street to Starr Avenue.
St. Clair Street, Cherry to Orange Street.
St. Clair Street, Knapp Street to Maumee Avenue.
Summit Street, Cherry Street to Elm Street;
expired on November 10th, 1910; and

"Whereas, no franchise rights for the operation of street cars on said Streets or any part of them have been granted by the Council of the City of Toledo; and

"Whereas, The Toledo Railways & Light Company is now operating street cars on all of said streets without right or authority;

"Now, Therefore,

"Be It Ordained by the Council of the City of Toledo, State of Ohio:

"Sec. 1. That upon the following terms and conditions and upon no other, consent, permission and authority are hereby granted to The Toledo Railways & Light Company to continue from day to day to operate its cars upon the streets and portions of streets above set forth, the operation to be in conjunction with all of the rest of the street railway lines of said The Toledo Railways & Light Company in the city of Toledo, so that the whole system will be operated as a unit and as one continuous system.

"Sec. 2. The operation of street cars on streets and parts of streets above set forth, shall be subject to the same terms and conditions as prevailed thereon under the grants prior to their expiration on November 10, 1910, and shall be further subject to the payment by The Toledo Railways & Light Company to the City of Toledo of the sum of Two Hundred and Fifty Dollars ($250.00) for each day that the streets and portions of streets above set forth have been used by said

The Toledo Railways & Light Company for the operation of street cars, beginning November 11, 1910; that within ten days after said The Toledo Railways & Light Company has been served by the Clerk of Council with a copy of this ordinance, The Toledo Railways & Light Company shall pay to the City of Toledo, at the rate of two hundred and fifty dollars per day, for the period beginning November 11, 1910, and continuing to the day of payment, and that thereafter said The Toledo Railways & Light Company shall pay to the City of Toledo at the rate of two hundred and fifty dollars per day, payable weekly thereafter, and except upon the foregoing terms and conditions, consent, permsision and authority are hereby refused and denied.

"Sec. 3. This ordinance is subject to revocation or amendment at any time at the will of the Council.

"Sec. 4. In case The Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly, according to the tenor and effect thereof, then the City Solicitor be and he is hereby authorized and directed to take such legal action as may be proper and necessary to enforce the provisions of this ordinance requiring the Company to pay such amount, or require the company to abandon the streets above mentioned.

"Sec. 5. The Clerk of Council is directed to deliver a certified copy of this ordinance to The Toledo Railways & Light Company.

"Sec. 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

14. It was, among other things provided in said ordinance set forth in the preceding paragraph that the operation of street cars on streets and parts of streets named in said ordinance should be subject to the same terms and conditions as prevailed thereon under the grants prior to the expiration on November 10, 1910, and that they should be further subject to the payment by this defendant to the City of Toledo of the sum of Two Hundred and Fifty Dollars ($250.00) for each day that the streets and parts of streets above set forth were used by this defendant for the operation of street cars, beginning November 11, 1910, and that this defendant should within ten days after it had been served by the Clerk of the Council of the City of Toledo with a copy of said ordinance, pay to the City of Toledo at the rate of Two Hundred and Fifty Dollars ($250.00) per day for the period beginning November 11, 1910, and continuing to day of payment, and that thereafter this defendant should pay the City of Toledo at the rate of two hundred and fifty dollars ($250.00) per day, payable weekly thereafter.

On the 31st day of August, 1911, the Board of Directors of this defendant duly adopted a resolution, of which the following is a copy:

"Whereas, the Council of the City of Toledo, purporting to pass, on the 26th day of July, 1911, and the Mayor of said City purported to approve, an alleged ordinance, purporting to grant the consent, permission and authority of the City of Toledo to The Toledo Railways & Light Company, to continue from day to day to operate its cars upon the streets and portions of streets in said purported ordinance set forth;

"Be It Resolved, by the Board of Directors of The Toledo Railways & Light Company, that said purported ordinance and offer therein contained, be, and the same hereby are, refused, and that no cars of this Company be operated at any time under or in pursuance of said purported ordinance, or of any grant, permission, authority or condition therein set forth."

A copy of said resolution, duly certified by the Secretary of this defendant, was, on the 31st day of August, 1911, delivered to the Clerk of the Council of the City of Toledo.

15. That this defendant did immediately after the passage of said ordinance of November 24, 1913, notify the defendant, the City of Toledo, that it could not operate its cars under the terms and provisions thereof, and asked the mayor and council of the City of Toledo to repeal said ordinance, which request the City of Toledo and its officials refused and failed to grant and comply with. That at numerous times thereafter this defendant requested the City of Toledo and its said officials to suspend the operation of said ordinance, or to repeal the same, pending the negotiations between this defendant and the defendant, The City of Toledo, with reference to a new franchise for the maintenance and operation of its street railway system in the City of Toledo, but notwithstanding the fact that negotiations are now actively pending and have been so pending ever since the adoption of the ordinance last aforesaid, the City of Toledo, through its council, on Monday, March 23, 1914, declined and refused to suspend the operation of said ordinance.

16. Notwithstanding the fact that this defendant has, holds and owns a number of franchises and grants from the defendant, the City of Toledo, permitting it to operate street cars over a large number of the streets of said defendant, The City of Toledo, and which said last mentioned grants and franchises will not expire on March 27, 1914, or for a long period of time thereafter, the defendant, The City of Toledo, through its officers, agents and employes give out and state that said defendant, the City of Toledo, and said officers, agents and employes, will enforce the terms and provisions of

said ordinance passed on November 24, 1913, after the 27th day of March, 1914; this defendant further says that said defendant, The City of Toledo, its said officers, agents and employes, will wrongfully and falsely inform and instruct the public and the persons and passengers riding and attempting to ride upon the cars of this defendant in the city of Toledo, after March 27, 1914, that such persons and passengers will each be entitled to ride upon said cars for a three cent fare, and that they, said officers, agents and employes of the defendant, The City of Toledo, will protect said persons and passengers in their alleged rights to ride for three cent fares, as aforesaid, and said officers, agents and employes are now publicly advising, through the newspapers and otherwise, that all persons and passengers desiring to ride upon said cars after March 27, 1914, shall refuse to pay more than a three cent fare each.

17. That this defendant is now carrying upon its cars about one hundred twenty-five thousand (125,000) pay passengers per day, and the service furnished by this defendant is the only public means of transporting passengers through or over the streets of the defendant, The City of Toledo.

18. That this defendant, The Toledo Railways & Light Company, cannot and should not, for the reasons stated herein, carry passengers for the rate fixed in said ordinance passed on November 24, 1913, nor should it be subjected to pay the rental of Two Hundred and Fifty ($250.00) Dollars per day provided for in said last mentioned ordinance and said ordinance passed July 26, 1911.

19. That the council of the said city of Toledo, in passing said ordinances of July 26, 1911, and November 24, 1913, has attempted to and will, unless restrained by the order of this court, impair the obligation of the unexpired franchises, grants and contracts hereinabove referred to, existing between this defendant and said City of Toledo, for the operation of street railways in and along the streets and public ways of Toledo, as aforesaid, in that the said ordinances reduce the rates of fare provided in said unexpired franchises, grants and contracts, and impose a rental for the use of said streets, and impose other additional burdens upon this defendant, and without the consent of this defendant; and this defendant says that if said ordinances are enforced by said city of Toledo it will take from this defendant its property, including many franchises which have not yet expired, and deprive it of its rights to operate its street railway system in accordance with its unexpired franchises and grants, and will amount to a confiscation of all the rights of said defendant in and to said street railway system and property; all without due process of law, and all in violation of the provisions of the constitution of the United States.

20. That if this defendant, The Toledo Railways & Light Company, refuses to accept three cent fares, as aforesaid after March 27, 1914, the persons and passengers riding and attempting to ride upon the cars of this defendant will, under the advice of the officers, agents and employes of the defendant, The City of Toledo, refuse to pay the fare to which this defendant is entitled, and confusion, trouble, annoyance and great loss, injury and damage will be suffered by this defendant.

21. That the City of Toledo is attempting, by its officers and agents, through the terms and provisions of the ordinances passed on November 24, 1913, and July 26, 1911, respectively, to force upon the defendant, The Toledo Railways & Light Company, an unjust, arbitrary and confiscatory rate of fare and rental, and said officers, agents and employes give out, state and threaten that they will either force this defendant, The Toledo Railways & Light Company, to accept the terms and provisions of said two ordinances, or compel this defendant to cease operating its cars in the City of Toledo after March 27, 1914; that this defendant cannot, for the reasons stated herein, accept the rates of fare and the terms and provisions of the ordinances of November 24, 1913, and July 26, 1911, and to stop the operation of its cars after March 27th, 1914, would paralyze the business and social activity of the City of Toledo, greatly inconvenience and injure the public, and be of great and irreparable damage to this defendant.

Wherefore this defendant respectfully prays and asks for an order and temporary injunction herein against the City of Toledo, its officers, agents, employes and all other parties and persons whomsoever to whom notice thereof is given, enjoining and restraining them and each of them, until the further order of this court, from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on July 26, 1911. hereinbefore described, and relating to the payment of Two Hundred and Fifty ($250.00) Dollars per day rental by this defendant, and from asserting, enforcing or attempting to assert or enforce any of the terms and provisions of a certain ordinance passed by the council of the City of Toledo on November 24, 1913, heretofore described herein, relating to the fares to be charged by this defendant after March 27, 1914, and such other order in the premises as to the court may seem proper, and that upon the final hearing of this cause such temporary injunction and order may be made perpetual, said ordinances declared null and void and of no effect; and this defendant further prays for all other relief to which it may be entitled by reason of the premises.

Rathbun Fuller,

Solicitor for the defendant, The Toledo Railways & Light Company.

Northern District of Ohio,
Western Division,
State of Ohio.
County of Lucas, ss.

Frank R. Coates, being first duly sworn, deposes and says that he is the president of the defendant, The Toledo Railways & Light Company, duly authorized to make this affidavit and verify the foregoing amended cross-bill; that he has read the foregoing amended cross-bill, and that the allegations in said amended cross-bill are true.

Frank R. Coates.

Sworn to before me and subscribed in my presence this 30th day of March, 1914.

Forrest Jeffries,
(Seal.) Notary Public, Lucas County, Ohio.

The United States of America
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the district Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Amended Cross Bill of The Toledo Railways & Light Company filed in the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 23rd day of September, A. D. 1914, and in the 139th year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal) By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2L.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

In Equity No. 86.

Henry L. Doherty et al.

Complainant,

vs.

The Toledo Railways & Light Company et al.

Defendants.

MEMORANDUM ON MOTIONS FOR TEMPORARY INJUNCTION.

Killits, J.:

This case was begun in January as a proceeding to secure the status of the judgment claim of the complainant, the partnership of Henry L. Doherty & Company, againt the defendant, The Toledo Railway & Light Company, which claim was collectible only, if at all, out of the equity of the defendant company in its properties in the city of Toledo, and subordinate to the mortgage lien covering such properties.

The principal relief demanded of the court was the appointment of a receiver, and, incidental thereto, it was asked that the court enjoin and make such other necessary orders as would insure the unimpairment of the equity of the company.

It is probably true that in this sense the affairs of The Toledo Railways & Light Company, including its properties and rights of all kinds, were brought into the custody of this court, and that we have constructive possession of the Company's affairs, to ripen into actual possession in case a receiver is appointed.

The character of our constructive possession is to be determined by reference to the power of the court invoked to ripen the constructive possession into an actuality. It is plain that if the demand is not pressed upon the court to appoint receivers, the possession which it is claimed the court now has of the affairs of the company is a mere legal figment, and that it cannot be maintained that such figurative possession is exclusive, if the situation is used merely for the purpose of pursuing reliefs asked for which

are merely ancillary to the apparent primary ground of action, to which alone the court's power of possession may be referred. As the formal application for a receivership is not yet pressed, it follows that demand for injunctional relief is merely a proceeding in personam and that the court ought at this time to consider its relation to the property of the company in precisely the same light as if no relief had originally been demanded of the court other than an injunction.

Stripped of the verbiage which the practice still insists shall characterize the pleadings in a Federal equity case, the naked issue for the court now to decide is, in its last analysis, this: May The Toledo Railways & Light Company enjoin the enforcement of two ordinances of the City Council passed, respectively, July 26, 1911, and November 24, 1913, and intended in each instance to prescribe terms upon which the company may occupy streets now claimed by the City to be free from franchises previously enjoyed by the Company?

The bill attempts to confer jurisdiction in this court by involving parties of diverse citizenship, because the complainant as a judgment creditor of the company is non-resident in the district. By supplement and amendment a second ground of jurisdiction in this court is attempted, in the insistence that the enforcement of these ordinances would impair the contractual rights of the company in the use of the streets and that it would be a taking of the company's property without due process of law, and that therefore the guarantees of the Federal constitution are violated.

We do not deem it necessary at this time to discuss the several objections so strenuously urged against the court's jurisdiction by the defendant, the City of Toledo, the principal one being that the City could not be made a proper party to the case, either as it was planted or as it is affected by subsequent attempts to amend and supplement the pleadings.

The objection to the court's jurisdiction made by the City is both to the subject matter and to the parties, and if the relief sought is one which the facts pleaded do not justify, jurisdiction is absent without reference to the alleged vagaries of the practice followed.

It is clear that the complainant creditor, Doherty & Company, has no relief against the City which its debtor, the company, might not claim; wherefore the ultimate question is as the court puts it above, and the answer is the same whether the attempt at relief be had in this court or a state court.

The complainant and the defendant company are at odds in their respective pleadings in this case on but one thing, and that is the question whether "at the present time the only franchises or grants which in connection with other franchises and grants give to the defendant the right to operate its present street railway system and property in the City of Toledo as a complete railway system are certain franchises which will expire by limitation on the 27th day of March, 1914," the company claiming that certain of its franchises which otherwise would be now expired and which in their extent are sufficient to give it, in connection with admittedly unexpired rights, a complete system, were extended to October 19, 1915, by virtue of certain provisions for passenger transfers with its predecessors in title, written as conditions to the Ironville franchise of October, 1890.

We find little difficulty in deciding this question adversely to the company. The Collins grant did not extend any franchise held by The Toledo Consolidated Street Railway Company, in our opinion. To so claim is to ignore the binding force of the decision of Cleveland Electric Railway Company vs. Cleveland, and Forest City Railway Company, 204 U. S., 116, upholding the decision of Judge Tayler in the same case, reported 137 Fed. Rep., 111. One cannot read the Supreme Court decision without discovering that it is on all points thoroughly in accord with the views of Judge Tayler.

For the purposes of the question before us, the facts in the two cases are substantially the same. Changing names and descriptions only, the statement of the third ground of complaint of the Cleveland Company as made by Judge Tayler in his opinion (p. 117) would be good here, and every word of his argument denying its validity, found on page 121, and his subsequent pointing out of the omission in the title of the ordinance relied upon for an extension to indicate such an object is fatal to the claim, having reference to the Ohio requirement that the subject of an ordinance "shall be clearly expressed in its title, and is equally decisive against the claim of the company here.

The title of the Collins ordinance is "To grant to William A. Collins, Trustee, his successors and assigns, the right to construct, maintain and operate a double-track standard gauge extension of the authorized line of street railway from Front Street, along Bridge Street, the bridge over the Maumee River, Cherry Street to Summit Street, to Monroe Street and to authorize the transfer by said trustee of his rights and franchises." To insist that a provision in an ordinance so entitled for mutual transfers with an independent and extensive street

car system will operate to extend the franchises of such older and larger systems for a period beyond that limited by the statute under which such franchises were granted originally is, as Judge Tayler said, "to surely do violence to the letter and spirit and perhaps of the legal requirement" respective title, and such a claim, to paraphrase his language, can be justified neither on the ground of reason nor of propriety.

In this same case Judge Tayler, page 117 of the opinion, states as a second ground of the company's complaint this—which is precisely that advanced to this court in the instant case—"that by reason of the consolidation of the companies and the creation of a 'system' over which there is a right to ride for one fare for continuous passage, however long, with certain transfer rights, the system must be considered as a unit, with a period of expiration fixed at the date of the last expiring franchise." His answer denying the validity of the claim is, in part:

"It is true that with a system, in so far as it is essential that all of its constituent parts should be unified, the right to operate it and all of its parts ought to be co-determinate; but two observations conclusively answer the contention of the complainant: First, that, if there is any control over the life of the system and of its parts, it is the life of the system which must control the life of the parts, not the part the system: second, it is far from the truth that, physically or practically or legally any one part of the system is essential to the operation and life of the system."

It also may be cogently urged as a reason for denying the claim that if the life of any constituent franchise is to be considered extended to the expiration of any other franchise whose enjoyment is necessary to the system, then we have not only the doctrine of extension of franchise by implication in the most mischievous form possible, but, as the owner of the system would have the power to co-ordinate the units thereof to meet his idea of convenience and economy of operation, he would gain an opportunity thereby to completely avoid the public will expressed in the council's legislation by maintaining, as is actually insisted in the case before us, that his contractual rights were to be impaired in violation of his constitutional guarantees, because in the loss through expiration of one franchise he could not as fully as before use another. To illustrate, the clear logic of the claim would extend every franchise to which the Central Avenue barns may be a necessary appurtenant to the defendant company's economy, until the Central Avenue franchise had expired.

Judge Tayler says, discussing these questions:

"Restrictions are vain if the checks put upon the methods of municipal legislation are not to be respected when they deal with fundamental rights. The rule that obligations arise or rights are granted by mere implication depends upon the nature of the parties, and the character of the obligations and rights. It is a very easy thing for a man competent to contract to have his rights determined by the just implications from his acts. He may find himself parting possession with his property even when he did not intend to do so. But this is all but impossible with a municipal corporation. Indeed, a municipal corporation, through its council or officers, may sometimes make strenuous efforts to part with its property or with public rights, and fail in the effort. * * * * But to say that a municipal corporation, the delegate of sovereignty, has parted with one of the powers of sovereignty by implication, is to assume that which, while not impossible, can only be supported by the strongest proof, and by an implication so cogent as to be quite as impressive and conclusive as if the grant had been made in express terms."

(Citing authorities.)

So we do not regard the questions before us as at all complicated by the fact that the company still owns franchises in various parts of the City which become mere shreds capable of little use if the lines affected by the expirations may not be used to connect them in a system. This contingency is just that which was involved from the beginning in their grants, and were conditions in future of those contracts as they are now conditions of fact.

In this connection it is also urged that the rights enjoyed by the company which the court has conceded, to use the streets day by day until ejected and to salvage its property, are contractual rights, because they are residual rights acquired under the contract now expired, and as such they cannot be impaired by any action of the City without a violation of the constitutional guarantee. Undoubtedly that position is correct, but it has little force on the question we are to decide, for the reason that these residual rights, although contractual, are affected and were created by and under the dominant right of the City to require their exercise under reasonable restrictions.

Before attempting an answer to the question, it is well to consider briefly the position of the company, its opportunities and responsibilities as a carrier for hire, occupying the streets without grant of right. The statement hitherto made by the court is to long to repeat in full, but it is not open to modification. It may be briefed in these words: That the company may run its cars day by day without the city's consent and charge fare because its service is a public necessity; it may

charge a rate that will pay its expenses of operation, including proper maintenance charges, and a fair return for the use of its investment. Out of any revenues which may remain it must compensate the city for the use of the streets, if the city demands. The city through the council may impose terms for this temporary use, which are binding upon the company only when they are reasonable, having regard to the circumstances peculiar to the local situation but the city may at any time summarily deprive the company of the use of the streets except to salvage its property, and the company may stop its cars at any time if it deems such course profitable to it. This statement is an epitome of the latest authorities, of which City of Detroit vs. Detroit United Railways, decided by the Supreme Court of Michigan, Oct. 1, 1912, 137 N. W., 645, is one of the most comprehensive.

The failure of the city to prescribe terms for a day by day use, or the failure of the city's attempt at terms because of unreasonableness, will not operate to continue the terms of the expired franchises. The use is under terms which have no relation to those of the expired franchises. Since midnight of last Friday the company has been using the streets under just as legally effective obligations to the City of Toledo and of the same extent and character as though they had been written in an ordinance accepted by it. The only advantage inherent in having the terms formulated in an ordinance is the advantage which a definite contract has over an implied contract.

With this view of the position the parties occupy toward each other, we look at the ordinances whose enforcement we are asked to enjoin. It is entirely clear that each of them deals with proper matters of regulation, and that neither of them is, on the face of things, unreasonable, except that provision of section 3 of the Ordinance of November 24, 1913, which reads: "And the continuing by said company of the operation of its cars on lines covered by said franchises expiring March 27, 1914, shall be deemed an acceptance of this ordinance and all the terms hereof." That part of the ordinance is so much waste verbiage.

It must be borne in mind that the council is dealing with a corporation engaged in providing a paramount necessity to the city, and the city's power is not to impose any terms, but reasonable terms, upon a use by the company of the public streets for transportation purposes. What the people of the city on Saturday needed and had to have, if the city was to continue its prosperity and its people enjoy the conveniences to which they are entitled, was the transportation it had on Friday. While it is the council's function to suggest terms, it is likewise the company's right to question their reasonable-

ness, and that right cannot be denied it. The council imposes terms in the interest of the public; the company likewise serves the public, and the insistence that the company shall lose its right to question the reasonableness of the conditions imposed upon it in the assumed interest of the public, because it serves the public, is intolerable. All the company needed to do to avoid this much of the ordinance, it did months ago, when it notified the city in writing that the ordinance was not and would not be accepted. Thereafter the provision quoted above became as if never written. (Detroit vs. Detroit United Railways, supra.)

Each ordinance contains substantially this provision:

"In case the Toledo Railways & Light Company refuses or fails to comply with the terms of this ordinance promptly and according to the tenor or effect thereof, then the City Solicitor be and he is hereby authorized and directed to take such legal action as may be proper and necessary to enforce the provisions of this ordinance, or require the company to abandon the streets covered by the franchises above mentioned."

In other words, the ordinance provides a method of enforcement, and it follows that, having made such provision, no other method than the one prescribed is possible without further legislation. What, in effect, then, this court is asked to do is to enjoin the City Solicitor from going into a court for an order to compel the company to obey either of these ordinances. If we should assume that duty, the first inquiry of fact confronting this court would be: Are the terms of the ordinances, respectively, reasonable? If so, neither complainant nor defendant company is entitled to the court's countenance. If the City Solicitor asks the court he enters to order the ordinances obeyed, the first inquiry of fact confronting that court is the same as here, and only as that court finds the ordinances, respectively, reasonable, does the company lose its defense. We must assume that the court which is asked by the City Solicitor to control the company will adjudge the issue involving the same facts and the same law precisely as this court would. In fact, the company's case for defense would be at least as broad and as complete as here it has a case for offense.

What we are asked to do, therefore, is to restrain the beginning of an action which has as its original purpose a testing of the reasonableness of these ordinances, and the ground of the demand upon us is that they are unreasonable.

This statement suggests its own answer. The extraordinary power of this court to grant injunctional relief may be exercised only when it is shown that the complainant will otherwise suffer substantial and irreparable injury, to meet which

he has no other adequate remedy. In our judgment, the company, and the complainant through the company, have a remedy as broad, as complete, and as effective to protect them, given to them by the law and the very ordinances which are under attack, as any relief which this court could grant by injunction. Nor is the other condition for injunctional relief present here. for we have not been shown any irreparable injury which will accrue to the company if this court refuses to command the City Solicitor not to test the reasonableness of these ordinance regulations in a court of his choosing.

We are not ignoring the cases of Detroit vs. Detroit Citizens Street Railroad Co., 184 U. S., 369, and Cleveland vs. Cleveland City Railroad Co., 194 U. S., 517. These cases are useful in that they assert the right of this court to grant injunctional relief only where the facts are entirely analogous. The following language in the opinion of the former case is significant:

"Bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject matter, and does not insist that there is an adequate and plain remedy at law, (and no such objection has been taken at any time, and has not been insisted upon before us,) we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it * * * * We do not mean to assert that in all cases of this nature, involving simply the validity of a subsequent ordinance or law, a court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the court at any stage of the litigation and is not now raised by any party to the same."

As these two cases stand in precisely the same classification, and the Cleveland case but follows the Detroit case because the facts are similar, we assume that if they have any importance at all in the instant case, it is to warn this court not to undertake jurisdiction until it has found a case substantially similar to them. Not only is this case clearly distinguishable from those cases in the fact that here is a sharp challenge of the court's jurisdiction and a persistent and well-founded insistence that the complainant has an adequate remedy other than by injunction, in that the company may resist the enforcement by legal procedure of the ordinances on the same grounds that it now attempts injunctional relief upon, but in each of those cases the city was endeavoring by ordinance to directly impair the validity of franchises not yet expired, a situation which does not obtain in the case before us. To illustrate the difference between these cases on the

one hand and the case at bar on the other, a similarity would arise only if the city council should have passed an ordinance directly requiring the Ironville line, whose franchise has eighteen months yet to run, to carry passengers for less than five cents, that being the rate provided by the franchise. An ordinance of that character would give rise to the identical situation which was decided in the Cleveland and Detroit cases referred to, but no such proposition is involved here. The ordinances under attack mean no more than that the company, if it wants to use the streets on which it has no rights, must as compensation therefor reduce the rates of fare on those streets on which its rights still exist. The company may decline these terms and enjoy its unexpired grants unimpaired by any provision of the ordinances under attack.

If these ordinances are unreasonable exactions, they are as if they never had been passed by the council, and the company is not affected by their presence on the ordinance books. It may continue to operate its cars until the city ejects it, without reference to them. They are not self-enforcing. We could give the company no safeguard by an order of injunction which is at all necessary to it if these ordinances are unreasonable, for it may ignore them with impunity up to the entry of an order respecting them made by a court whose power the City Solicitor may invoke under the ordinances themselves, and when that order is entered, the company will be in precisely the same position it would be in if this court should undertake to pass upon the force and effect of the ordinances. All we can see the complainant or the company could hope to gain by an order from this court enjoining the City Solicitor from enjoining the duty imposed upon him by the ordinances would be the moral effect of a judgment that the ordinances were unreasonable. While an early solution of this contention is highly desirable, we cannot agree that that fact is a sufficient ground for injunctional relief.

We notice last the insistence that an injunction is necessary to prevent a multiplicity of suits, and the confusion that might ensue because of the popular belief that a right exists to ride for a three-cent fare. We have given this question considerable attention, and are unable to see how such a situation could be met by any order this court might make. Its order would be against the representatives of the city only, and could not run against inidvidual citizens, unless the court should completely take into its possession the street railroad system. Our order, therefore, would have but moral force, if any, against those disposed to take advantage of the ordinance on their individual accounts, and would not reach the dignity of a prevention. The fear also takes no account of

the obvious duty of the peace officers of the city to protect the company in its rights until the ordinance which it questions is tested and determined.

Toledo, Ohio, March 30, 1914.

John M. Killits,
Judge.

The United States of America,
Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Memorandum on Motions for Temporary Injunction, filed March 30, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk.
(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2M.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partenrs, Doing Business Under the Firm Name and Style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company and the City of Toledo.
Defendants.

AMENDMENT AND SUPPLEMENT OF THE TOLEDO RAILWAYS & LIGHT COMPANY TO ITS AMENDED CROSS-BILL.

1. By leave of court first obtained, the defendant, The Toledo Railways & Light Company, presents this, its amendment and supplement to its amended cross-bill heretofore filed herein, and respectfully shows to the court, as follows:

2. That the ordinance passed by the council of the city of Toledo on the 24th day of November, 1913, fully set forth in paragraph 11 of this defendant's amended cross-bill, was passed by said council on the same day that it was introduced in said council, under suspension of the rules; that said council at the time it passed said ordinance, and prior thereto, had made no examination, investigation or appraisal of the street railway property of this defendant, and did not know and had not endeavored to inform itself as to the value of said property; that said council had made no investigation or examination for the purpose of ascertaining the cost of operation of the street railway system of this defendant, and that at the time of passing said ordinance, did not know even the approximate cost of such operation, and said council made no investigation or examination for the purpose of ascertaining or determining whether the revenue of the company under said ordinance, if the same were accepted by the company, would pay the cost of operation and a reasonable return upon the value of the street railway property of the company; that the council which passed said ordinance and the mayor who signed the same were about to retire from office, and their offices did in fact expire on the 31st day of December, 1913, and said officers were succeeded by their successors on the 1st day of January, 1914; that said ordinance was not passed, adopted and approved by said officers in good faith, but was passed, adopted and approved wantonly and maliciously, for the purpose of injuring this company and depreciating and destroying its property, and for the purpose of putting and placing the incoming administration in an embarrassing and indefensible position, and in order that said incoming administration might be discredited in enforcing or attempting to enforce said ordinance.

3. That the only way in which an estimate can be made as to the amount of revenue which this defendant would receive from operation of its street cars under said ordinance is to apply the rate fixed in said ordinance to the operation of the cars of this defendant during a preceding period of time, and based upon the number of passengers carried during said period; that, making said estimate upon the operation of the street cars of defendant during the year, 1913, the result will be, as follows:

The total number of passengers carried by defendant during the year 1913 was 61,686,168, of which 47,877,673 were revenue or pay passengers, the difference between said number of passengers carried being those that were carried on free tickets or transfers; that the total amount received from said pay passengers was $1,886,736.82; that the average rate of fare received per pay passenger during said year 3.93

cents, and the return per total passenger carried was 3.05 cents; that upon the basis of said ordinance passed by the City of Toledo on November 24, 1913, the company would have received during the year 1913, assuming the same number of pay passengers and the same number of total passengers, a total revenue from pay passengers of $1,416,222.00, and the average rate of fare per pay passenger would have been 2.96 cents, and the average rate of fare per total passenger would have been 2.33 cents.

That the cost of operation of the street railway system of this defendant during the year 1913 was, as follows:

Total cost of street railway operation per total passenger,		2.65 cents.
Made up, as follows:		
Operation,	1.73 cents	
Maintenance) 6¢ per car mile),	.75 cents	
Taxes,	.17 cents	
	2.65 cents	2.65 cents.

In said cost of operation per passenger, there is no allowance for interest or dividend charges on capital invested, and nothing is allowed for amortizing the property during the life thereof. The cost of operation during the year 1913 was economical and the cost of labor and material is constantly increasing, and is likely to cost more in the future than it has in the past. In said computation, no allowance has been made for the payment of rental for the use of the streets, and if rental is to be allowed or paid, it would add proportionately to the cost of operation. If this defendant had received fares and revenue provided in the ordinance of November 24, 1913, upon the number of passengers aforesaid carried by it during the year 1913, the actual operation of this defendant would have resulted, as follows:

Total receipts from street railway operation,	$1,435,206.00
Total operating expenses, including taxes and maintenance,	1 638,377.00
Deficit	$203,171.00

In the above computation, there has been no allowance made for rental for the use of the streets, nor has there been credited the amount received by this company from interurban street railway companies for use of the tracks and power by said interurban companies, but the total amount received from all sources on account of such street railway operations during the year 1913, including receipts from the inter-

urbans, was $155,599.00, so that, even if this last named sum was taken into account, there would still be a deficit in the actual cost of operation of $47,572.00, without allowing any return whatever upon the actual value of said street railway property.

There would probably be a small percentage of increase of traffic if the street railway fares were reduced as provided for in said ordinance passed November 24, 1913, but defendant is informed and believes, based upon experience of itself in the operation of its system, and upon the experience of other street railway companies, that such increase would not be sufficient to materially reduce the deficit in operation, and certainly would not be sufficient to pay to the defendant any return whatever upon the actual value of the street railway property of this defendant; that the value of the property of this defendant used and useful in the operation of its street railway property, not including its power houses, is approximately $11,000,000.00, based upon valuations of similar property in other cities of the United States, and upon the actual value of defendant's said property.

4. That negotiations have been pending between the defendant, the City of Toledo, and this defendant, with reference to a renewal of the street railway franchises of this defendant for more than eight years last past; that about the year 1910, an agreement was reached between the defendant the City of Toledo, and this defendant, wherein it was provided that the city should employ an expert accountant, who should make a complete examination and audit of the books and accounts of this defendant, for the purpose of ascertaining the receipts and disbursements of the company, and for the purpose of obtaining reliable data upon which the City of Toledo could act in arriving and determining the proper rates of fare to be provided in any renewal franchise granted to this defendant; and it was provided that this defendant should pay the compensation and expense of such expert so selected by the City of Toledo; that in pursuance of said agreement, the City of Toledo employed and selected as its expert one Carl Nau, who at once entered upon such employment, and made a full, complete, exhaustivve and detailed examination, investigation and report of the receipts, expenses and operations of the street railway property of this defendant for a period of nine years next preceding the date of said examination, and said Nau was retained by the City of Toledo in said capacity as accountant, for the purpose of making such investigation and reports as the city might require down to and including the year 1912, and said Carl Nau made exhaustive, complete and detailed reports of all of his

examinations, showing the receipts, expenses and operations of the street railway system of this defendant from the years 1902 to 1912, both inclusive; that this defendant, in compliance with said agreement with the City of Toledo, fully paid all of the compensation and expenses of said accountant; that notwithstanding the fact that this defendant permitted said examination to be made by the expert so selected by the City of Toledo, and paid the expense thereof, and fully complied on its part with said agreement, the City of Toledo and its officers at no time since said examination was so made have paid the slightest attention or given the slightest consideration to the reports of its said expert, or to any of the data, information or recommendations made by said expert. Defendant is informed and believes and avers that none of the officials of the City of Toledo, either of the present administration or of the former administration, ever read, examined or attempted to give consideration to the reports or recommendations of said expert, but, on the contrary, in the passage of said ordinance of November 24, 1913, and in the subsequent negotiations with this defendant, the City of Toledo and its officials have entirely ignored the reports, work and recommendations of its said expert; that said Carl Nau is one of the leading accountants and experts in the United States, and is particularly well qualified to examine and report upon the accounting and operation of street railway properties; that defendant is informed and believes that the reports made by said Carl Nau, and which said reports defendant avers are now and for a long time last past have been in the possession of the officials of the City of Toledo, are full, complete and detailed reports, showing the receipts and expenses and the results of operations by this defendant of its street railway system for the years above mentioned, that said reports show, as this defendant is informed and believes, that if the rates of fare provided in said ordinance passed November 24, 1913, had been in effect during said years, respectively, that the receipts of the company for said years, based upon the number of passengers carried, would have not been sufficient to pay the cost of operation of defendant's street railway system, without making any allowance whatever for income upon the value of defendant's street railway property.

5. That the ordinance passed on July 26, 1911, and fully set forth in paragraph 13 of the amended cross-bill of this defendant, wherein it is provided that this defendant shall pay as rental for certain streets upon which its franchises are alleged to have expired the sum of two hundred fifty dollars ($250.00), for each day that said streets and portions of streets therein set forth are used by this defendant for the

operation of street cars, has not been enforced by the City of Toledo, and this defendant has paid no rental under the terms thereof; that if said rental had been paid by this defendant, or it should hereafter be required to pay said rental, then any and all sums so paid for such rental by this defendant would necessarily be charged to the cost of operation, in addition to the cost of operation heretofore charged as above set forth, and the loss to this defendant would thereby be correspondingly increased.

6. That shortly prior to the month of January, 1912, certain of the street railway franchises under which this defendant has been operating its cars over the streets of the City of Toledo, had expired; that negotiations were then being carried on between defendant and the officers of the City of Toledo with reference to the renewal of its street railway franchises, and the matter had been referred on behalf of the city by the council thereof to the mayor and a committee of the council; that during said month the council of the City of Toledo had passed an ordinance similar in its terms to the ordinance herein referred to as having been passed on November 24, 1913, and the said ordinance had been delivered to the mayor for his approval; that while said ordinance was being considered by the mayor, the mayor and the committee appointed by the council above referred to and representatives of this defendant, entered into a tentative agreement, wherein and whereby it was provided that this defendant should, pending the future negotiations and pending the settlement of the street railway franchise controversy, reduce its fare during the hours from 5:30 to 7:30 a. m. and from 4:30 to 6:30 p. m., to three cents or five tickets for fifteen cents; that prior to that time defendant had been and then was entitled to and did charge during all hours of the day on said lines at the rate of five cents for a single fare or six tickets for twenty-five cents; except on certain lines its fare was three cents for two hours a day; that thereupon, in pursuance of said tentative agreement, the mayor addressed a letter to the council of the city of Toledo; a copy of said letter is hereto attached marked "Exhibit A" and made a part hereof. In said letter the mayor set forth the substance of the tentative agreement so entered into. That said letter was read to the council at the next session thereof after the passage of said ordinance, and thereupon one of the members of the council moved that the council reconsider its vote on the passage of said ordinance in accordance with the recommendation of the mayor, and said motion was submitted to the council and duly carried; and thereupon it was moved by one of the members of said council that the city solicitor be empowered to meet with a representative of The Toledo Railways & Light Company

to draft an ordinance for a permanent franchise in accordance with the recommandation of the mayor, and said motion was duly carried.

That in pursuance of said agreement, this defendant at once put said three cent fare into effect, and ever since said time has continued to carry passengers during the above hours at the rates of fare specified in said agreement, and is still fully complying on its part with the arrangement then and there made; that negotiations have been pending continuously between the City of Toledo and this defendant with reference to a settlement of said railway controversy and the granting of a renewal and extension of the street railway franchises of this defendant, ever since said arrangement was entered into between defendant and the City of Toledo, and such negotiations are still pending.

That the passage of said ordinance of November 24, 1913, and its attempted enforcement as set forth in its original cross bill and in this amendment and supplement thereto, is in violation of the spirit and letter of said arrangement so entered into between the representatives of the City of Toledo and this defendant.

7. That prior to the 28th day of March, 1914, which was the date that the ordinance passed on November 24, 1913, above referred to, purported to take effect and be binding upon this defendant in the event it operated its cars on and after that date, certain of the officers and representatives of the City of Toledo, including the mayor and the city solicitor, gave out and made public statements to the street car patrons of this defendant that beginning on the 28th day of March, 1914, and thereafter until another ordinance was passed by the council of the City of Toledo, that street railway passengers would be entitled to ride at all hours of the day upon the cars of this defendant on all of its lines at the rate of fare fixed in said ordinance of November 24, 1913, viz: three cents each, and that this defendant would have no right to eject any passenger tendering a three cent fare from its cars, and advised and urged all street railway patrons to tender only a three cent fare during all hours of the day, and to refuse to leave the cars when ordered to do so by the men in charge thereof and to thus resist all efforts of this defendant to collect more than a three cent fare; that by such statements on the part of certain representatives of the City of Toledo, a very large number of the citizens of Toledo were caused to believe that they had a legal right to ride for a three cent fare, and such persons and also a very much larger number who apparently had no thought or care on the subject decided to take advantage of such condition and to tender a three cent fare.

That beginning on the morning of March 28, 1914, by reason of the facts aforesaid, the public conditions were such that defendant believed and still believes that if it had attempted to eject from its cars all persons who tendered a three cent fare and refused to pay the fare theretofore received by this defendant, that such action on the part of this defendant would have brought on great disorder, riots, and a public turmoil, which would have resulted in the loss of life, injury to persons, and great damage to property; that to avoid such calamity this defendant adopted the policy of using moral suasion in the collection of its regular fares and if a passenger refused to pay more than the three cent fare, the fare tendered by him was refused and the passenger was permitted to ride free; that this policy has been continued by this defendant from the morning of the 28th day of March, 1914, to and including the present time. That one of the controlling reasons for this defendant adopting and carrying out the above policy, was the fact that the city solicitor of the City of Toledo had stated upon the former hearing of this cause upon the motion of this defendant for a temporary injunction herein, that he, the city solicitor, would at once apply on or immediately after the 28th day of March, 1914, to a court of competent jurisdiction for an order against this defendant, requiring this defendant to comply with the provisions of the ordinance of November 24, 1913, and to accept three cent fares from all passengers; that under the former holding of this court this defendant was unable to have the question of its right to collect its regular fare determined in court until the city attempted to enforce the provisions of the ordinance of November 24, 1913.

But notwithstanding the statement of the city solicitor that he would cause proceedings to be intstituted in a court of competent jurisdiction for said purpose, he wholly failed and neglected to do so, and for the purpose of inducing the city solicitor to institute such proceedings, this defendant, during the month of May, 1914, cause to be published a statement to the public in which it stated that commencing within a few days thereafter this defendant would refuse to receive three cent fares excepting during the hours from 5:30 to 7:30 a. m. and from 4:30 to 6:30 p. m.. and would insist on its legal right to collect its regular fare, and would eject from its cars all passengers refusing to pay such fare; that the city solicitor and the other representatives of the City of Toledo, instead of then causing proceedings to be instituted in a court of competent jurisdiction, for the purpose of testing the right of the City of Toledo to enforce said ordinance of November 24, 1913, as said city solicitor had stated and promised that

he would do, gave orders through the proper authority to the chief of police and to the other officers and men of the police department, instructing them to place on each of the cars of the defendant an officer and that upon any conductor of any such car insisting upon the collection of more than a three cent fare tendered by any passenger, and upon the conductor ordering such passenger to leave the car, that the officer upon such car should at once arrest the conductor and take him into custody, removing him from the car. That the instructions of the officers of the City of Toledo to the police department as aforesaid were to enforce the provisions of the ordinance of November 24, 1913, and that in fact the police department was thoroughly instructed and were ordered to report for such duty, and did report for duty, and were all ready to carry out and enforce the instructions so received by the police department from the mayor, the city solicitor, and other city authorities.

That the day prior to the date at which this defendant's order to collect its regular fares as aforesaid was to go into effect, this defendant at the earnest solicitation of a large number of the representative citizens of the City of Toledo, who promised to use their best efforts to endeavor to bring about a fair adjustment of the street railway franchise controversy, revoked its order to collect its regular fare as aforesaid, and since said date has continued the same policy as to the collection of fares and carrying of passengers as that hereinbefore set forth.

8. That the mayor, city solicitor, and other representatives of the City of Toledo still publicly state that if at any time this defendant attempts to collect its regular fares, that they will give the same order to the police department as that hereinabove recited, and will through the police department cause the conductors and men in charge of the cars of this defendant to be at once arrested and incarcerated in the city prison, and this defendant avers that unless the defendant, the City of Toledo, its officers, agents and employes, are restrained by this court, that the said City of Toledo, its officers, agents, and employes will, in the event this defendant attempts to collect its regular fare as aforesaid, at once arrest and remove from the cars its conductors, motormen and employes, and leave the cars of this defendant upon the streets wherever they may happen to be at the time, unprotected, and will thereby stop all street railway transportation in the City of Toledo and cause great and irreparable damage to this defendant as well as great demoralization, trouble, annoyance and expense to the citizens of the City of Toledo and to the public. That such action on the part of the City of Toledo, its officers, agents, and employes, is and will be an attempt on the part of

the City of Toledo to enforce said ordinance of November 24, 1913, which said ordinance is for the reasons above set forth and as charged in the original bill, confiscatory, illegal, void and of no effect as against this defendant.

9. That notwithstanding the fact that this defendant is not required nor obligated in any way to operate its cars over and along the streets where its franchises have expired, the defendant the City of Toledo, through its officers, has, as this defendant is informed and believes, instructed the police department and the fire department of said defendant that if this defendant at any time ceases to operate its cars over and along said streets, and attempts to remove its cars therefrom to places of safe storage, that said police department and fire department, and the officers and men thereof, shall prevent this defendant from so removing its cars and obstruct it in any attempt so to do, and to use force for the purpose of keeping the cars of this defendant in operation upon said streets. And this defendant is informed and believes and avers that if it should attempt to cease operating its cars upon said streets and to remove the same to places of safe storage that said defendant the City of Toledo through its said police department and fire department will by force obstruct and prevent this defendant from so doing. That such action and threatened action on the part of the City of Toledo and its officers, is and will be an attempt on the part of the City of Toledo to enforce said ordinance of November 24, 1913, which said ordinance is for the reasons above set forth and as charged in the original and amended cross bills, confiscatory, illegal, void and of no effect as against this defendant.

10. That by reason of the large number of passengers riding free as aforesaid, the income of this defendant from its street railway passenger service, from and including the 28th day of March, 1914, down to and including the present time, has been greatly diminished, and this defendant has lost by reason thereof at the rate of more than one thousand dollars per day for each and every day of said period; that its income for its street railway service during said period has not been sufficient to pay operating expenses and taxes, and that it has been ever since March 28, 1914, and still is conducting its street car service at a financial loss, but that it has been carrying on said service for the purpose of furnishing street railway transportation to the public, well knowing that a cessation of such service would result in great injury and loss to the citizens of the City of Toledo and the public.

11. That by reason of the facts aforesaid and in spite of all efforts on the part of this defendant to prevent the same, numerous controversies are constantly occurring between pas-

sengers and the employes of this defendant in charge of its cars over the question of fare to be paid by such passenger, and such controversies have resulted in a large number of suits having been commenced by passengers against this defendant, claiming damages from this defendant on account of the actions of its employes at the time of such controversies; that a number of the plaintiffs in said suits are represented by certain of the assistants to the city solicitor, and the result of the action of the city solicitor and the other officers in advising street car patrons to tender a three cent fare is to stir up litigation against this defendant, in which the city solicitor's department represents the plaintiffs, as this defendant is informed and believes, to the financial benefit of the assistants of the city solicitor so acting as attorneys for the plaintiffs, and this defendant is informed and believes that the city solicitor and his said assistants are inviting any passenger of this defendant having a controversy with defendant on account of fare to employ the city solicitor or his assistants, or some of them, for the purpose of instituting and prosecuting suits against this defendant by reason thereof, and that by reason of said facts this defendant is becoming involved and will continue to be involved in a large number of suits, and is and will be put to great cost and expense in the defense thereof. That said action on the part of the city solicitor and his assistants is an indirect attempt on their part to enforce on behalf of the defendant the City of Toledo said ordinance passed November 24, 1913.

12. That notwithstanding the attempts of defendant as aforesaid to avoid controversies over fare with persons riding on its cars, a large number of such controversies have arisen in which there have been physical encounters between this defendant's employes and persons riding on such cars, and that there have been a large number of instances in which persons have attempted and insisted upon riding upon interurban cars operating over the tracks of this defendant for a three cent fare, that such persons have been ejected from said interurban cars by the employes of said interurban companies, and numerous physical encounters have taken place, and as a result thereof that a large number of employes of this defendant and of such interurban companies have been arrested, in many instances as this defendant is informed and believes at the instigation and suggestion of the city solicitor of the City of Toledo, or his assistants, and that said action of said solicitor and his assistants is an indirect attempt upon their part to enforce said ordinance of November 24, 1913.

13. That for several years last past there has been an agitation among a considerable portion of the public demanding that the street railway franchises of this defendant should

never be renewed or extended, but that they should be allowed to expire and that the street railway property of this defendant should thereafter be acquired by the City of Toledo as soon as the law would permit the same to be done, and that the street railway system should be owned and operated as a municipal enterprise. That one of the purposes in the passage of the ordinance of November 24, 1913, was to injure the street railway property of this defendant by compelling this defendant to operate the same at a loss so that in the event it was determined that the City of Toledo should acquire said property by condemnation proceedings, or otherwise, that the value thereof would be greatly diminished on account of the fact that the same was being operated at a loss. That the attempted enforcement by the defendant the City of Toledo of the provisions of said ordinance since the 28th day of March, 1914, up to and including the present time, is in furtherance of said plan to injure and diminish the value of the property of this defendant so that when the same is acquired by the City of Toledo, if it is so acquired, it will be acquired at a greatly reduced price and a price much below what it would otherwise be reasonably worth. That said ordinance of November 24, 1913, was conceived, prepared, drafted, and enacted without reference to the fairness of the rates therein prescribed or of the other provisions thereof, or the effect on the properties and income of this defendant, but for the purpose of compelling and hampering this defendant in the operation of its street railway system, and to depreciate the earning capacity and value of its street railway properties, in order to enable the defendant the City of Toledo to purchase and acquire said property of this defendant at less than its fair value.

14. By the fifth amendment of the Constitution of the United States it is provided that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation, and in the fourteenth amendment to the Constitution of the United States it is further provided that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws. This is a case arising in equity under the Constitution of the United States and the judicial power of this honorable court extends to and embraces this case and the issues herein set forth involve federal questions under said Constitution of the United States. By reason of the acts and facts and things herein and in this defendant's original and amended cross bills alleged, the pro-

visions of the ordinance of November 24, 1913, are unreasonable, unjust, fraudulent, confiscatory, and if enforced will compel this defendant to conduct its business and operation without fair remuneration. Said rates of fare and the terms of said ordinance are violative of and prohibited by each and all of the said provisions of said Constitution of the United States and by reason of and under said provisions are null and void.

Wherefore, this defendant repsectfully prays and asks for an order and temporary injunction herein against the City of Toledo, its officers, agents, employees, and all other parties and persons whomsoever to whom notice thereof is given, enjoining and restraining them, and each of them, until the further order of this court, from asserting, enforcing or attempting to assert or enforce, any of the terms and provisions of said ordinance passed by the council of the City of Toledo on November 24, 1913, and that said City of Toledo, its officers, agents and employes, and all other persons whomsoever to whom notice thereof may be given may be enjoined and restrained from interfering with the withdrawal by this defendant of its cars from the streets of the City of Toledo upon which its franchises have expired, and the storing of same in such place as it may deem best; and that upon final hearing of this cause such temporary injunction and order may be made perpetual. And this defendant further prays as in its amended cross bill herein.

Rathbun Fuller,
Solicitor for the Defendant The Toledo Railways & Light Company.

Northern District of Ohio, Western Division, State of Ohio, County of Lucas, ss.

Frank R. Coates, being first duly sworn, upon his oath says that he is the president of the defendant The Toledo Railways & Light Company, duly authorized to make this affidavit and verify the foregoing amendment and supplement to the amended cross bill of said defendant; that he has read said amendment and supplement to said amended cross bill, and that the allegations in said amendment and supplement thereto are true, except such allegations as are therein stated to be made upon information and belief, and as to such allegations he believes them to be true.

Frank R. Coates.

Sworn to before me and subscribed in my presence this 6th day of August, 1914.

Harry W. Isenberg,
(Seal.) Notary Public, Lucas County, Ohio.

EXHIBIT A.

To the Honorable the Council,
Toledo, Ohio.

January 8th, 1912.

Gentlemen:

On the first day of January your honorable body passed an ordinance entitled "An ordinance pertaining to the terms upon which The Toledo Railways & Light Company may operate street cars on streets and public places in the City of Toledo and authorizing the City Solicitor to take legal steps to enforce this ordinance." While this ordinance has my entire approval and I felicitate the City Solicitor on conceiving it and the council on passing it so promptly, I have withheld my formal action on it until your honorable body could reconsider it in the light of the events that have transpired since the last meeting of your honorable body.

For the sake of clarity it may be well to review briefly the progress of the negotiations with The Toledo Railways & Light Company since the expiration of its franchises. As your honorable body is aware the Mayor was authorized by the committee of the whole council to negotiate a settlement, subject to the ultimate approval of the council, of the transportation problem, and in opening the negotiations I was authorized to say that the question of the occupancy by the company of those streets wherein its franchises rights had expired would be left temporarily in abeyance, in the hope that we might reach a solution of the larger problem, which would, of course, include the smaller. When these negotiations were interrupted last summer by differences over the question of valuation. the council appointed a committee consisting of Mr. Schreiber the City Solicitor, Mr. Merrell, Mr. Spitzer, Mr. Robson and myself to enter into some arrangement with the company as to the terms on which the company might temporarily use the streets wherein its franchises had expired. This committee had several meetings with representatives of the company, and some weeks ago demanded that the company carry passengers temporarily at the rate of seven tickets for a quarter. This the Company refused to do, and as a result Mr. Schreiber drew and introduced and council passed the ordinance under notice.

Before I acted on this ordinance, which, of course, I intended to approve, The Toledo Railways & Light Company proposed the following in lieu of the seven tickets for a quarter which the city's representatives had demanded:

1. That the company would carry passengers for the perior of two hours each morning and two hours each evening

(the hours to be designated by the city) for cash three cent fares, and during that time would sell five tickets for fifteen cents and grant universal transfers.

2. That it would carry passengers at other times during the day at the rate of six tickets for a quarter, good on all lines in the city, with universal transfers.

3. That it would carry children under eight years of age for one cent and children in arms free.

4. That the application by the U. S. Mortgage & Trust Company for a receiver of The Toledo Railways & Light Company, filed on the 4th day of January in the United States Circuit Court would not be pressed.

5. That whatever sums might then be owing to the city for the rental of streets which the company had occupied since the expiration of its franchises should be still due and owing and would be paid, if so determined by the courts; provided, however, that the rental charge should not be applicable to the period in which these fares are in force.

6. That these rates of fare should continue in force until the franchise problem was settled, or for (90) ninety days at least, and that, in any event, the company would not alter them without giving 30 days' notice.

7. That an auditor paid by the company might be designated by the city to enter the offices of The Toledo Railways & Light Company, and there to examine their books, accounts and receipts during the period that these rates of fare are in force.

The Company was to install a three cent cash fare service on the 8th of January, and this, of course, went into effect this morning. The hours were then fixed at from 5:30 to 7:30 in the morning and from 4:30 to 6:30 in the afternoon. They were so fixed because the company's experiments have shown that at those hours there is the heaviest traffic, and the result of these experiments seems to coincide with those made in Cleveland and elsewhere. It is to the city's advantage and to the company's as well to have these hours set at the time when traffic is heaviest, because thereby the greater number of people are benefited by the three cent rate and the company secures the advantage of the larger returns to be expected from the stimulation of traffic. If, however, experience or new light shall show that other hours are better, or will benefit more people, the hours may be changed at any time, giving, of course, for convenience sake, a few day's notice.

I need hardly point out to your honorable body the many improvements this arrangement has over that now in vogue, for its advantages are apparent. The city had asked for seven tickets for a quarter temporarily, and this concession is the equivalent to seven tickets for a quarter, and, in some respects,

is better than seven tickets for a quarter, in that, during the period of the day when traffic is heaviest, the people will actually be riding for three cents. This rate benefits especially those portions of the population that do the real work of the city and gives them now, what we have so long been struggling to obtain for them, namely, a three cent fare; that is the benefit goes where it is most needed and where it is most deserved.

Aside from the question of the rate of fare the city will now have the opportunity, under the eye of an auditor appointed by the city, to learn something of the effect of the stimulus to traffic of three cent fares on which we have so long counted to make them effective. But greater than all is that moral victory which comes from the recognition by the company of the principle for which this city has so long contended. I am not without hope that this temporary arrangement will in a measure do away with certain recent differences and soften somewhat the asperities that arose from them, and that now, by the negotiations which I am about to suggest, a settlement may be reached which will be honorable and just to all, and under which, until the time comes when the city can own and operate its own street car system (for which, of course, provision must be made) the Company will carry passengers at the cost of service, and the service will be dictated by the city, a principle upon which happily the city and the company now seem to be at one.

It is hardly necessary for me to point out to your honorable body that this agreement is purely informal, that it is not by any means a permanent solution of the franchise question, nor does it indicate the terms which are to go into the ultimate ordinance. It requires no legislation to make it effective; under it the company acquires no legal rights nor does the city concede any of its rights or advantages. Its effect is to place the negotiations where they were broken off last summer, with this added advantage, that meanwhile during the time that they shall proceed, the people will be riding in the busy hours of the day on a three cent fare, and during the rest of the day may buy six tickets for a quarter and have universal transfers on all lines at all times. This vastly improved condition, of course, was brought about by the prompt action of your honorable body New Year's night under the advice of the City Solicitor in passing the emergency ordinance he had drawn. The people will duly recognize the benefits they have derived from your action and they will be encouraged in their hope that this whole problem may be speedily and properly settled, and they will, no doubt, be relieved to know that the drastic measures to which the city was about to re-

sort under this ordinance, will not now be necessary, although by the temper they have displayed they are willing at any time to undertake and endure such inconveniences in order to secure their rights.

The object of the ordinance under notice having been temporarily effected, therefore, the city will naturally forego the exercise of its powers in that regard. Indeed insistence now on its terms would be manifestly inconsistent and unfair, pending an effort to solve the entire problem; and for that reason, in which I am sure your honorable body will concur, I ask that the vote by which the ordinance was passed be reconsidered, and the ordinance be sent to committee.

I suggest that it would be unwise to pass any legislation at this time relating to the whole subject, lest new complications arise, and therefore I respectfully recommend that the City Solicitor be instructed and empowered to meet with Mr. Fuller, the attorney of the company, and draft an ordinance to be submitted to your honorable body containing the terms of a permanent settlement, this ordinance to provide for street railway transportation to the people at cost, giving the city the power to regulate and dictate the service, providing the means whereby when authorized by the state so to do the city may acquire and operate the system as a municipal enterprise; and fixing the fare at a rate to be finally determined by your honorable body.

Yours very sincerely,
(Signed) Brand Whitlock,
Mayor.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Amendment and Supplement of The Toledo Railways & Light Company to its Amended Cross Bill, filed August 7, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 129 year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2N.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,
Defendants.

MOTION FOR TEMPORARY INJUNCTION.

Now comes the defendant The Toledo Railways & Light Company, and moves the court for the issuance of a temporary injunction herein, in accordance with the prayer of said defendant's amended cross bill and the prayer of the amendment and supplement thereto.

Rathbun Fuller,
Solicitor for said Defendant.

The United States of America,
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certfy that I have compared the within and foregoing transcript with the original motion for temporary injunction, filed August 8, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 129 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 20.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Co.

Plaintiffs,

vs.

The Toledo Railways & Light Co. and the City of Toledo.

Defendants.

MOTION.

Now comes the defendant, the City of Toledo and moves the Court to dismiss this action as against The City of Toledo on the grounds:

1st. That the Court has no jurisdiction of the subject matter of this action and of the City of Toledo.

2nd. That the bill and amended bill in equity of the plaintiff, the cross-bill and amended and supplement of the cross-bill of defendant, the Toledo Railways & Light Co. and the pleadings of the plaintiff and defendant the Toledo Railways & Light Co., do not state facts sufficient to constitute a cause of action against the defendant, The City of Toledo.

Wesley S. Thurstin, Jr.,
Solicitor for defendant the City of Toledo.

The United States of America,
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original motion filed August 14, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 22 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2P.

The United States of America,
Northern District of Ohio,
Western Division, ss:

At a stated term of the District Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the last Tuesday in April being the 28 day of said month, in the year of our Lord, one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-eighth to-wit: on Saturday the 15 day of August, A. D., 1914.

Present: Honorable John M. Killits, United States District Judge.

Among the proceedings then and there had were the following, to-wit:

In Equity No. 86.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company and the City of Toledo,
Defendants.

ORDER.

This day this cause came on for hearing upon the motion of the defendant the City of Toledo to dismiss this action as against the City of Toledo for the reasons and grounds therein stated, and upon consideration the court finds that said motion is not well taken and the same is therefore overruled, to which order of the court the defendant the City of Toledo, duly excepted.

Thereupon, on leave of court the defendant the City of Toledo is given leave to answer the amended cross bill and the amendment and supplement to the amended cross bill of The Toledo Railways & Light Company on or before the 22nd day of August, 1914.

On application of The Toledo Railways & Light Company the motion of said The Toledo Railways &

& Light Company for a temporary injunction upon its amended cross bill and the amendment and supplement to said cross bill is set for hearing by this court on the 8th day of September, 1914, at 10:00 o'clock a. m. or as soon thereafter as the same can be heard by the court.

The United States of America,
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original order entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 21 day of September, A. D. 1914 and in the 139 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2Q.

(Answer—Filed August 22, 1914.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 86. Equity.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners, doing business under the firm name and style of Henry L. Doherty & Company,
Plaintiffs,

vs.

The Toledo Railways & Light Company and the City of Toledo,
Defendants.

ANSWER OF THE CITY OF TOLEDO TO THE BILL AND AMENDED BILL OF HENRY L. DOHERTY, ET AL.

Now comes the City of Toledo heretofore made a party in this case by order in this court and for answer to the bill and amended bill of Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company and says, that this defendant is uniformed and without means to inform itself respecting the allegations contained in Section 1 of plaintiffs' bill and therefore denies the same and asks proof of the allegations therein contained.

This answering defendant admits the allegations contained in Section 2 of said bill and in respect to Section 3 it admits the recovery of the judgment as set forth therein, but charges that said judgment was obtained by collusion of the parties to said judgment and that said judgment was obtained for the purpose of instituting this action.

In respect to section 4 this answering defendant says that the execution set forth therein was not issued in good faith and that the Sheriff so ordered plaintiff to return the writ therein described endorsed execution and was ordered to state thereon that he found no monies, goods, chattels or other property, whereon to levy within

Lucas County belonging to the defendant Toledo Ra
ways & Light Company and defendant further says th
there has been no attempt to satisfy said judgment and th
said judgment can be at any time satisfied were plainti
desirous of so doing.

Answering Section 5 this defendant admits the ow
ership by the Toledo Railways & Light Company by t
plaintiffs therein described, but denies that said Compa
owns a large number of franchises and says that sa
franchises are but few in number and that said Compa
is operating upon the streets of Toledo its said Railw
System almost entirely without authority of law.

Defendant admits the allegation in Section 6 a
those allegations respecting the indebtedness of said Co
pany in section 7 but denies that said Company has
property subject to execution of law and denies that pla
tiff is unable to enforce or collect its judgment exc
by the aid of a court of equity.

In answering section 8 of said bill, this defenda
admits that an important part of said company is
Street Railway System, and that said system is the res
of the assembling, acquiring and merging of numero
small street railway systems and properties operati
over and upon the streets and public ways in the City
Toledo, under and by virtue of numerous franchises a
grants at one time given by the City of Toledo to t
owners of said several Street Railway systems, but s
grants have almost entirely expired and there are but ve
few now remaining and such as do remain of said gra
are of such a nature that they cannot form a continuo
system of street railways, and said grants are of but lit
value, and admits that certain franchises and grants
pired on March 27, 1914; defendant admits the alle
tions contained in Sections 9, 10 and 11.

Relative to the amendment and supplement of
Bill of Plaintiffs this answering defendant admits the a
gations contained in Sections 1, 2 and 4, except that ne
tiations are now pending with the Toledo Railways
Light Company and the City of Toledo, which defend
denies;

Defendant admits the allegations contained in S
tion 5 thereof, except that portion relating to the wro
ful and false information and instructions to the pu
which defendant denies and says that since the 27th
of March, 1914, the defendant, The Toledo Railways
Light Company, has carried subsequently all of the p
engers tendering three cents, for one continuous pass
free of charge.

Respecting Section 6, this defendant is not informed as to the number of passengers the defendant company carries per day, and asks proof thereof, and denies that said company furnished the only public means of transporting passengers through and over the streets of the City of Toledo.

This defendant denies the allegations contained in Section 7, of said amendment and supplement.

Answering Section 8, of said amendment this defendant denies that by reason of the advice of the officers, agents and employees of the City of Toledo, confusion, trouble or annoyance arose by reason of the passengers riding on the cars of the defendant company through said passengers tendering three cents in payment of their passage on said cars and denies that the defendant company is entitled to charge more than three cents and says that no loss, injury or damage has been suffered by said defendant company by reason of the acts of the City of Toledo, its officers, agents or employes.

Answering Section 9 of said amendment and supplement to the plaintiffs bill, this defendant says that if any agreement was entered into by the then Mayor of the City of Toledo, and a Committee of the Council of the City of Toledo, and the defendant Company, such agreement on the part of the aforementioned officials was ultra vires and without authority on the part of said officials and this defendant says that carrying of passengers by the defendant company at a rate of three cents per passenger during certain hours and six tickets for twenty-five cents with universal transfers as alleged by plaintiff was a voluntary act on the part of the defendant company.

This defendant admits that the rates of fare were a material reduction from the rates that said defendant had charged theretofore, but denies that it now has the right to charge more than the amount specified by the ordinances of the City of Toledo and denies that said defendant company has carried out the terms of any agreement with the City of Toledo, and denies that there is any agreement in existence other than the ordinances of the City of Toledo in pursuance of which the defendant company shall operate its cars on the streets of Toledo

This defendant denies that the City of Toledo is attempting to force upon the defendant company any unjust, arbitrary and confiscatory rate of fare and rental, and defendant denies that it has at any time given out or stated or in any way attempted to force the defendant company to cease operating its cars in the City of Toledo.

This defendant further says that no action on the part of the City of Toledo has in any way effected plaintiffs or created great and irreparable damage to plaintiffs as lien-holders or otherwise, and says that whatever action the City of Toledo, its officers, agents and employes have taken with respect to defendant company has been in the pursuance of the duty and legally enacted ordinances of the City of Toledo as a political subdivision of the State of Ohio, and in pursuance to the rights granted to the several states of the United States in the Constitution of the United States of America.

The defendant further says that the defendant company is operating its street cars upon the streets of the city of Toledo without authority of law and only at the pleasure and sufferance of the City of Toledo, and not otherwise, and that said defendant company is subject to and governed by the ordinances and laws of the City of Toledo in the same manner as other persons and since the 27th day of March, 1914. Said Company has continued to operate its cars on the streets of this defendant accepting in payment for the transportation of passengers such sums of money as said passengers chose to offer except as to those passengers tendering three pennies, said defendant company has voluntarily and without request, demand, coercion or order of the City of Toledo, its agents or employes carried such passengers free of charge except between the hours of 5:30 and 7:30 a. m. and 4:30 and 6:30 p. m. when said passengers have been carried for three cents or the equivalent thereof, and that by the action of the defendant company it has complied with the terms of the ordinances of the City of Toledo, and if any injury has arisen to the defendant company, it has been by said company's voluntary acts and not otherwise.

Wherefore, this defendant prays that this action be dismissed as to this defendant and this defendant be assured its costs in this action.

Wesley S. Thurstin, Jr.
Solicitor for the Defendant, The City of Toledo.

State of Ohio, Lucas County, s. s.

Wesley S. Thurstin, Jr., being first duly sworn, deposes and says that he is the duly elected, qualified and acting City Solicitor of the City of Toledo and as such City Solicitor is empowered and authorized by law to defend this action for the City of Toledo, Ohio, and says that the statements and allegations contained in the foregoing

answer of the City of Toledo are true, except such allegations as are stated in said answer upon information and belief which allegations he believes to be true.

Wesley S. Thurstin, Jr.,

Sworn to before me and subscribed in my presence this 22d day of August, 1914.

(Seal). Irvin E. Austin,
Notary Public, Lucas County, O.

The United States of America,
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Answer of the City of Toledo to the Bill and Amended Bill of Henry L. Doherty et al., filed August 22, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 21 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

(Seal) B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2R.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

ANSWER OF THE DEFENDANT THE CITY OF TOLEDO TO THE CROSS-BILL AND SUPPLEMENT THERETO OF THE TOLEDO RAILWAYS & LIGHT COMPANY.

Now comes the defendant, The City of Toledo, heretofore made a party by order of this court, and for its answer to the cross-bill of The Toledo Railways & Light Company admits the allegations contained in Sections 1, 2 and 3 of said Cross-bill except as to the allegations contained in the third section thereof respecting a large number of franchises or grants now owned by said defendant company, and states that there are very few franchises and grants now owned by said company in the City of Toledo.

But this defendant admits the allegations contained in sections 4, 5, 6 and 7 of said cross-bill, except that in Section 7 defendant denies that by virtue of the grant made by the City of Toledo on the 6th day of October, 1890, the franchises and grants upon streets other than those contained in said grant of October 6, 1890, were extended.

Defendant denies the allegations contained in Section 8 of said cross-bill.

Defendant admits the allegations contained in Section 9 of said cross-bill relative to the negotiations with the City of Toledo looking toward the granting by the City of Toledo to this defendant prior to the 8th day of January, 1912, of a franchise, and admits that the defendant company had acquired other street railway lines in the City of Toledo in addition to those set forth in Section 7 of said cross-bill, and denies that the City of Toledo entered into an agreement for a

temporary charge for the transportation of passengers in the City of Toledo as set forth in said Section 9, and denies that negotiations are now pending between said defendant company and the City of Toledo, and says that whatever rates of fare were put in force by the defendant company on or about the 8th day of January, 1912, were done voluntarily by the defendant company, and that any acts by the Mayor of the City of Toledo was without authority of law, and of no effect.

Answering Section 10 of said cross-bill this defendant admits that the defendant company notified the City of Toledo that it could not operate its cars under the terms and provisions of the ordinance of November 25, 1913, and that it asked that said ordinance be repealed, and that it has since said date requested the City of Toledo and its officials to suspend the operation of said ordinance, or repeal the same, pending negotiations between the defendant company and the City of Toledo with reference to a new franchise, and admits that the Council of the City of Toledo on March 23, 1914, declined and refused to suspend the operation of said ordinance.

Answering Section 11 of said cross-bill this defendant admits that the defendant company owns and holds some franchises and grants from the City of Toledo, but says that they are few in number and do not constitute one continuous system and but a small portion of the system of car lines operated by the defendant company, and further says that the officers, agents and employes of the City of Toledo are bound and enjoined by the laws of the State of Ohio and the ordinances of the City of Toledo to enforce the laws of the State of Ohio and the ordinances of the City of Toledo, and that whatever steps have been taken by the officers, agents or employes of the City of Toledo have been those authorized and enjoined upon them by the laws of the State of Ohio and the ordinances of the City of Toledo and no other, and denies that the officers, agents and employes of the City of Toledo have wrongfully or falsely informed or instructed the public and the passengers riding, or attempting to ride, upon the cars of the defendant company that such passengers will be entitled to ride upon cars for a three cent fare, and admits that the officers, agents and employes of the City of Toledo will protect and would protect the passengers riding on said cars, as they are enjoined to protect the people of the City of Toledo by the laws of the State of Ohio and the ordinances of said city.

Answering section 12, this defendant says it is without knowledge respecting the number of passengers carried by the defendant company and asks proof thereof.

Answering Section 13, this defendant denies that the defendant company cannot carry passengers and comply with the

ordinance of November 24, 1913, and says that said company has voluntarily carried passengers at a rate greatly in reduction of that specified in said ordinance.

Answering Section 14 and 15, defendant denies the allegations therein contained.

Answering Section 16, this defendant denies that it has attempted to force upon the defendant Company an unjust, arbitrary and confiscatory rate of fare and rental, and says that the fare and rental enjoined upon the defendant Company by the ordinances of November 24th, 1913, and July 26th. 1911, are fair and reasonable, and denies that it has attempted to force the defendant Company to cease operating its cars upon the streets of the City of Toledo.

Answering the amendment and supplement of The Toledo Railways & Light Company to its amended cross-bill, this defendant admits the allegations contained in Section 1 thereof.

Answering Section 2, this defendant admits the passage of said ordinance of November 24, 1913, and denies that said Council at the time it passed said ordinance, and prior thereto, had made no examination, investigation or appraisal of the Street Railway property of this defendant, and denies that it did not know, and had not endeavored to inform itself as to the value of said property, and denies that said Council had made no investigation or examination for the purpose of ascertaining the cost of operation of the Street Railway System of the defendant company, and denies that said council did not know the approximate cost of such operation; admits that the Council which passed said ordinance, and the Mayor who signed same were about to retire from office and that said officers were succeeded by their successors on the first day of January, 1914; denies that said ordinance was not passed, adopted and approved by said officers in good faith and denies that said ordinance was passed, adopted and approved wantonly, maliciously for the purpose of injuring defendant company and depreciating and destroying its property, and denies that it was for the purpose of putting and placing the incoming administration in an embarrassing and indefensible position, and denies all other allegations contained in said Section 2, except those admitted herein.

Answering Section 3, this defendant is without knowledge of the averments therein and asks proof thereof; this defendant denies that the defendant company's street railway property, not including its power houses, is approximately eleven million dollars, upon any basis whatsoever.

Answering Section 4, this defendant admits that negotiations have been pending between defendant company and the City of Toledo and that the City of Toledo employed an Ac-

countant, and admits that said Accountant made a report of his examination showing receipts, expenses and operation of the street railway system of the defendant company from the years 1902 to 1912, but says that said report was not in proper form or intelligible, is and was subject to various constructions, but has in a measure acted as a guide to the City of Toledo relative to its consideration of the street railway matters pertaining to the defendant company, and denies that said report shows that passengers cannot be carried by the defendant company in compliance with the ordinance of November 24, 1913.

Answering Section 5, this defendant denies that the ordinance of July 26, 1911, has not been enforced by the City of Toledo, but says that the defendant company is indebted to the City of Toledo under the terms of said ordinance and that the defendant company has accepted the terms thereof by the operation of its cars upon the streets belonging to this defendant, and that the defendant company is well able to pay the rental therein prescribed.

Answering Section 6, this defendant admits the expiration of the franchises prior to the month of January, 1912, and that negotiations have been pending between the defendant company and this defendant in reference to the renewal of the defendant company's street railway franchises, and denies that the City of Toledo entered into an agreement with the defendant company whereby the defendant company reduced its fares as alleged in said section, but that the reduction so made was voluntary on the part of the defendant company, and says that any offer, agreement or act on the part of the Mayor of the City of Toledo granting, or allowing the defendant company rights in the streets of Toledo were without authority of law and could be of no force or effect without the passage of an ordinance by the Council of the City of Toledo and as provided by the laws of the State of Ohio, and denies that the passage of the ordinance of November 24, 1913, and the enforcement thereunder is in violation of the spirit and letter of any arrangement made by the City of Toledo or the defendant company, and further says that all arrangements made with said company were by virtue of the ordinances of the City of Toledo and the laws of the State of Ohio, and no other.

Answering Section 7, this defendant says that whatever acts were done by the Mayor, City Solicitor, or other officers of the City of Toledo, or statements made by them, were only such acts and statements as were enjoined on them by law and were only for the purpose of protecting the City of Toledo against the attempt on the part of the defendant company to usurp the rights of the City of Toledo in the streets owned

by this defendant. Defendant denies that there was any danger of disorder, riot or public turmoil on the morning of March 28, 1914, so long as the defendant company complied with the laws of the State of Ohio and the ordinances of the City of Toledo, and that any riot, turmoil or disorder that would have arisen would have been by reason of acts of the defendant company. Defendant denies that the reason for the defendant company carrying passengers free was because the City Solicitor of the City of Toledo would at once apply on or immediately after the 28th day of March for an order against this defendant requiring this defendant to comply with the provisions of the ordinance of November 24, 1913, and denies that the defendant company was unable to have its right to collect fares other than those provided in the ordinance of November 24, 1913, determined in the court. Defendant further says that the defendant company voluntarily carried passengers free after March 27, 1914, and did so with the intent and purpose of trying to coerce and embarass people into paying a greater fare than that prescribed by said ordinance and in the hope that the City of Toledo would grant to the defendant company such franchise as the defendant company wished.

This defendant denies that the City Solicitor of the City of Toledo agreed to institute an action against the defendant company and says that whatever action was taken by the City of Toledo, its officers, agents or employes were only those enjoined upon them by law to take and were such as were necessary to protect the citizens of the City of Toledo against the threats and abuse of the defendant company, its authorized agents and employes. This defendant further says that the agents and employes of the defendant company have attempted through the public press, and otherwise to create in the minds of the citizens of the City of Toledo a contempt for the ordinances of the City of Toledo and the laws of the State of Ohio, the oaths of the officials of the City of Toledo and the promises of said officials, and in every way attempted to discredit the City of Toledo, its officers, agents and employes with the sole and only purpose in view of coercing and intimidating the officials of the City of Toledo to grant to the defendant company the right to operate upon the streets of the City of Toledo upon the terms of the defendant company.

Answering Section 9, this defendant admits that the defendant company is not required or obligated to operate its cars on the streets of the City of Toledo and says that it has done so only upon the terms laid down by the City of Toledo which is given to said city by the laws of the State of Ohio; this defendant denies that it has at any itme attempted to, or in any way tried to interfere with the defendant company in

the storage or removal of its cars and denies that it ever had the slightest intention of so doing, and that the allegations made in Section 9 relative thereto are not made in good faith.

Answering Section 10, this defendant is without knowledge as to the diminishing the income of the defendant company and asks proof thereof.

Answering Section 11, this defendant says that the allegations set forth therein are impertinent, immaterial and scurrilous, without foundation in fact or law and asks that they may be disregarded and stricken out by this court.

Answering Section 12, this defendant says that the physical encounters between defendant company's employes and persons riding on said cars have been caused by the insulting remarks, abuse and ill treatment accorded passengers by the employes of said company, and denies that the City Solicitor and his assistants have instigated or suggested that the arrests be made other than the complaints registered at the office of the City Solicitor and the fulfillment of duty by said Solicitor and his assistants in preparing affidavits for said warrants as said office is enjoined by law to do.

Answering Section 13, this defendant admits that a great number of people in the City of Toledo have advocated the owning by the City of the Street Railway System, which by law said citizens and the City of Toledo had a right to do, and denies that the passage of the ordinance of November 24, 1913, was to in any way injure the defendant company.

Answering Section 14, this defendant admits the allegation respecting the fifth and fourteenth amendments to the Constitution of the United States, but denies that defendant company's rights thereunder have in any way been infringed or abridged and denies that this action is one in equity but says that said action was started for the express purpose of nullifying the ordinances of the City of Toledo and the statutes of the State of Ohio as they apply to the defendant company.

This defendant further says that Henry L. Doherty, one of the plaintiffs herein, is under contract with the defendant company to operate its property and is in charge of the defendant company's money and property and that his interests are the interests of the defendant company, that they are coextensive and alike and that this action was brought by Henry L. Doherty and his partners without any intent to collect said judgment, or in any way interfere with the finances of said company, but only for the purpose of bringing the City of Toledo into this court to suspend the operation of the ordinances of the City of Toledo and the laws of the State of Ohio.

This defendant further says that the defendant company is without rights in the City of Toledo upon a great majority

of the streets over which it now operates its cars and that the rights of the City of Toledo are paramount to those of any other person or company in said streets, and that any person or company using the streets of the City of Toledo have the right to so use them only upon the terms prescribed by said City, and that the defendant Company in operating its cars upon said streets operates them only by virtue of the provisions set forth in the ordinance of July 26, 1911, and November 24, 1913.

Wherefore, this defendant prays that this action be dismissed as to this defendant and that it recover its costs of suit and for such other and further relief as this defendant is in law and equity entitled.

Wesley S. Thurstin, Jr.,
Solicitor for the Defendant The City of Toledo.

Northern District of Ohio,
Western Division
County of Lucas, ss.

Wesley S. Thurstin, Jr., being first duly sworn upon his oath says that he is duly elected, qualified and acting City Solicitor of the City of Toledo and as such is empowered and directed by law to defend this action and says that the facts contained in the foregoing answer are true and that those allegations made on information and belief he believes to be true.

Wesley S. Thurstin, Jr.

Sworn to before me and subscribed in my presence this 22nd day of August, 1914.

Irvin E. Austin,
(Seal.) Notary Public, Lucas County, O.

The United States of America
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Answer of the City of Toledo to the Cross Bill and Supplement Thereto of the Toledo Railways and Light Co. filed August 22, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 22 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal) By F. W. Gaines,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2S.

The United States of America,
Northern District of Ohio,
Western Division, ss:

At a stated term of the District Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the last Tuesday in April, being the 28 day of said month, in the year of our Lord, one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-eight, to-wit: on Wednesday, the 9 day of September, A. D. 1914.

Present: Honorable John M. Killits, United States District Judge.

Among the proceedings then and there had were the following, to-wit:

In Equity No. 86.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, Partners doing business under the name and style of Henry L. Doherty & Company,

vs.

The Toledo Rail ays & Light Company.

Upon application of the City of Toledo, leave is hereby granted to it to file forthwith an answer to the amended cross bill herein.

The United States of America
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original order entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 23 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,
(Seal) By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2T.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO.
WESTERN DIVISION.
IN EQUITY.

Henry L. Doherty et al., etc.,

Plaintiffs,

vs.

The Toledo Railways and Light Company and the City of Toledo,

Defendants.

ANSWER OF THE CITY OF TOLEDO TO THE AMENDED CROSS BILL OF THE TOLEDO RAILWAYS & LIGHT COMPANY.

Now comes the defendant, the City of Toledo, and for answer to the amended cross bill of The Toledo Railways & Light Company admits Sections One, Two and Three, and all of Section Four except that portion which states that defendant owns and operates a large number of franchises or grants, and states in respect thereto that the grants of the defendant company are but few.

Defendant admits the allegations contained in Sections Five, Six, Seven and all of Section Eight, except that portion which alleges that by virtue of the grant set forth in said amended bill the franchises of The Toledo Consolidated Street Railway Company were extended, which portion this defendant denies.

Answering Section Nine, this defendant denies that the defendant company is permitted to charge for the carrying of passengers, upon its tracks in its said system, any sum not exceeding five (5) cents per passenger.

This defendant admits the allegations contained in Section Ten, except that in respect to the arrangement of fares, and says that such arrangements were made voluntarily by said defendant company, and that any acceptance in relation thereto, by the Mayor of the City of Toledo, was without authority of law, and therefore denies that portion of said allegation respecting said temporary fare.

Defendant admits the allegations contained in Sections Eleven, Twelve, Thirteen, Fourteen, Fifteen, and all that portion of Section Sixteen, except the allegation that this defend-

ant, its officers, agents and employes, will wrongfully and falesely inform and instruct the public and the persons and passengers riding and attempting to ride upon the cars of this defendant in the City of Toledo, after March 27, 1914, that such persons and passengers will each be entitled to ride upon said cars for a three cent fare, and that they, said officers, agents and employees of said defendant, The City of Toledo, will protect said persons and passengers in their alleged rights to ride for three cent fares, as aforesaid, and said officers, agents and employees are now publicly advising, through the newspapers and otherwise, that all persons and passengers desiring to ride upon said cars after March 27, 1914, shall refuse to pay more than a three cent fare each, and says that the City of Toledo, its officers, agents and employees, acting in their authority as such, have not done, or will not do, any act wrong or false, but that they will act within the scope of their authority and will protect persons and passengers in their rights, as citizens of the City of Toledo.

This defendant admits the allegations contained in Section Seventeen, except that it denies that the defendant company furnishes the only means of transporting passengers in the City of Toledo, Ohio.

Defendant denies the allegations contained in Sections Eighteen, Nineteen, and that portion of Section Twenty relating to fare to which defendant company is entitled, and that confusion, trouble, annoyance and great loss, injury and damage will be suffered by defendant company.

Defendant denies Section Twenty-one.

Wherefore, this defendant prays that this case be dismissed as to this defendant, and that it recover its costs, and for such other and further relief as this defendant is in law and equity entitled.

Wesley S. Thurstin, Jr.,
Attorney and City Solicitor for the City of Toledo.

United States of America. State of Ohio, Lucas County, ss:

Wesley S. Thurstin, Jr., being first duly sworn on his oath says that he is the duly elected and acting City Solicitor of the City of Toledo, Ohio, and, as such solicitor, is empowered to defend this action for the City of Toledo, and states that the facts contained in the foregoing answer are true, and that those stated upon information and belief he believes to be true.

Wesley S. Thurstin, Jr.

Sworn to before me and subscribed in my presence this 9th day of September, A. D. 1914.

Irvin E. Austin,
(Seal.) Notary Public, Lucas County, Ohio.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original answer of The City of Toledo to the amended cross bill of The Toledo Railways & Light Company, filed September 9, 1914, in the therein entitled cause at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 22 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,

(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2U.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. .....

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

MEMORANDUM OF OPINION ON MOTIONS OF THE PLAINTIFFS AND THE DEFENDANT, THE TOLEDO RAILWAYS & LIGHT COMPANY, FOR TEMPORARY INJUNCTION.

Killits, J.:

The first motions in this case for temporary injunctions to restrain the operations of the so-called Schreiber ordinance were denied because then the city was neither attempting to enforce it nor by its terms was allowed to enforce it except through an order of a competent court before which the complainants could charge and prove, if possible, that it was con-

fiscatory and consequently invalid. The consequence of this opportunity to the complainants to resist an order of enforcement left this court powerless to apply the extraorinary remedy of injunction. The court then had jurisdiction of the main case, to which the motions were plainly ancillary.

It is unnecessary to cover again in full the discussion then had of the relative rights of the company on the streets without franchise, and the city. It is sufficient here to say only that the company might run its cars from day to day until forbidden by the city at such rate as it was able to collect, and that it had the right to charge a rate that would pay its operating expenses and leave a surplus equal to a fair return upon its real investment, and further, at any time the company might discontinue service, take its cars off the streets altogether, and remove its tracks. The city, on the other hand, might either forbid the company absolutely the use of the streets, or permitting the use, impose therefor reasonable regulations respecting service and rates of fare.

The ordinance in question never having been accepted by the company, the initiative for enforcing it was upon the city, and that fact was recognized by its author in the provision directing the City Solicitor to go into court for an order on the company to observe it. It is not an ordinance which the city can enforce through its police power.

Conditions have radically changed, however, since last March. During the intervening months, the city's executive, neglecting the direct and only proper method of enforcement which the ordinance itself provided, but which involved a decision of the contention loudly urged by the company that it was oppressive and unreasonable, attempted indirectly its enforcement through an encouragement of reliance upon its terms by individuals. The uncontradicted evidence in this hearing shows that, taking the indefensible position that the measure was self-enforcing, the officers of the city assumed an attitude of sustaining private judgment, even to the extent of suggesting that the power of the city would be employed to assist any individual who attempted to enforce his opinion of his rights under it. This was a wholly indefensible position. To have placed at the call of any individual, to enforce his judgment that he should ride at three cents, a policeman, would have been as flagrant an abuse of power as to have given the same individual police aid to enforce any other private right he assumed to have without any other adjudication than this own consideration.

By the ordinance itself, the company was given the right to question its obligations thereunder in a duly constituted general forum for the adjudication of responsibilities, and was not obliged to submit to the view of any person who chose to

board its cars. The effect of the city's attitude, however, was practically an enforcement, and the company was faced with the alternatives of submitting without a test or of suffering innumerable annoyances and suits in the nature of damages, and, in all probability, violence. It is to deal with precisely these situations that courts of equity are open to suitors of any class, and this corporation, as is the case with any individual person, is under the protection of the guaranties of the federal constitution.

We hold, therefore, that the court may now, as we could not before, inquire into the charge that the ordinance is confiscatory in its effect, and if we find the facts clearly sustaining the charge, we may apply the extraordinary remedy of injunction.

This ordinance, as in the case of any other legislation, is favored by every presumption. It is presumed that the public agencies concerned in its production acted intelligently, honestly and providently, and that its terms are reasonable and fair. The fact that a piece of legislation enjoys these presumptions does not however, make it invulnerable. It may still be attacked in any of these particulars, the presumptions having the effect only of testimony of validity, wherefore clear evidence against it may be adduced to overcome them and to set it aside. The court also, while bound to indulge these presumptions, may look to the surroundings for a measure of their strength. The law of Ohio provides rules to secure deliberation in the passage of ordinances of this kind. Three readings on three different dates are required to precede the adoption of such a measure, unless some emergency or other proper reason impels a suspension of the rules by a three-fourths vote of the council.

This measure, not to go into effect for four months and not for three months after the incoming of a new council and a new administration, was passed to adoption through three readings at one sitting by a council and urged by an administration whose friends had just suffered defeat at an election.

These circumstances suffice to start speculation upon the value of the presumptions. When, however, we find, as the testimony here shows without dispute, that, at the time this ordinance was passed and signed, the executive of the city was not only possessed of statistical information in most illuminative detail from its trusted expert, which, properly considered, showed that a three cent fare was confiscatory, but that also the force of such statistics to this effect was pointed out in advice privately given in writing and orally by this expert to the executive, with reasons why a three cent ordinance should not be passed, and, further, that the city had, in November, 1913, no evidence or light whereon to base a fix-

ing of rate except that given it by its own chosen expert to the above effect, it does not take a very acute mind to see that these vaunted presumptions descend nearly to the level of mere legal figments.

However, the court on this hearing honored them to the full by requiring the movants to sustain the burden of their charge that the ordinance was unreasonable by clear evidence, and it was not until, through the testimony of the city's own expert, Nau, and a showing of the experience of the company, a volume of evidence was had which demanded that the city produce support for the failing presumptions upon which it relied, that the court required any action at all by the city. Every possible facility was afforded the city to support the ordinance, the court adjourning the hearing for five weeks for that purpose. The record now shows in evidence comprehensible to every intelligent man, and derived from testimony in which there is absolutely no dispute, that this ordinance is unfair and that to attempt to enforce it is to attempt confiscation.

The City Solicitor, after struggling against the inevitable as long as possible, finally, and commendably, confessed that it was impossible either to get any other evidence than that before the court or to draw any conclusion from the testimony, which he could not dispute, than that at the rate of three cents the company's revenue would do more than barely pay running expenses, leaving nothing for a return upon the investment. There are some lines in the city on which a fare under three cents would pay operating expenses; there are lines on which six cents and even seven cents would not even expenses. There is one line whose revenue does not net one-third of its expenses, and others whose returns are but one-half to two-thirds of their outlays. Averaging all the lines together, if the public insists upon the present routing, any man capable of doing sums in simple arithmetic can see that an average rate of three cents is too low. It is demonstrated from the record that if every person who has ridden on the cars since March 27th last, whether he had paid or not, had paid three cents, the income of the company would barely have paid its expenses, and the months since March are the months of a year when traffic is the heaviest and expenses the lightest.

It is beyond dispute from this record that this ordinance is unreasonable and unfair, wherefore it should be declared invalid, and an order to that effect may be entered.

September 12, 1914.

John M. Killits,
United States District Judge.

Plaintiff's Exhibit No. 2V.

The United States of America, Northern District of Ohio, Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original memorandum of opinion on motions of the plaintiffs and the defendant, The Toledo Railways & Light Company, for temporary injunction, filed September 12, 1914, in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 22 day of September, A. D. 1914, and in the 139 year of the Independence of the United States of America.

B. C. Miller, Clerk,

(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2V.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 86.

April Term, A. D. 1914, to-wit: September 11, 1914.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company and The City of Toledo,

Defendants.

ORDER.

On the 8th day of September, 1914, this cause came on to be heard upon the separate motions of the plaintiffs and of the defedant, The Toledo Railways & Light Company, for the issuance of a temporary injunction herein against the City of Toledo, the prayers of said motions being that the defendant, the City of Toledo, be temporarily enjoined from enforcing in any way, directly or indirectly, the provisions of a certain ordinance of said city passed by the council thereof, locally and generally known as the Schreiber Ordinance.

That the hearing upon said motions continued through the 9th day of September, 1914, and at the conclusion of the sitting of the court on said day, the evidence in respect to the same having been concluded and arguments of counsel thereon having been heard, the court took under consideration its duty under the law and the evidence pertaining to each of said motions and the defenses thereto.

That during the 10th day of September, 1914, and at the time of the occurrences hereinafter referred to and up to and at the time of the entering of this order, the consideration of the law and evidence pertaining to such motions and the defenses thereto continued and still continues with the judge of said court without final determination thereof.

That the court is informed and finds upon such information, for the purpose of this order, that one John Quinlivan, a citizen of the city of Toledo, Ohio, at the time of the occurrences hereinafter referred to, occupied an official position in an organization known as The Central Labor Union of said city, his official position being substantially that of corresponding secretary and business agent of said Union; that said Union is made up of representatives of organizations composed of and representing a large element of the population and of the citizenship of the city of Toledo, and that the official position of said John Quinlivan and his relation to said Central Labor Union and its constituencies through the representation of its membership is one of great influence.

That, on the evening of said 10th day of September occurred a regular and public meeting of said Central Labor Union, presided over by the officers thereof and held at its accustomed place of meeting in the city of Toledo, largely attended by members thereof and other citizens.

That at said meeting, and with reference to this cause and the fact that at said time said court and the judge thereof had the issues involved in said motion and the evidence and law pertaining thereto under consideration, the said John Quinlivan publicly introduced and advocated the passage of a resolution by said Central Labor Union, in substance, condemning what said John Quinlivan assumed might be the final determination of said court upon the issues and evidence presented touching said motions, and in support of the said proposition so advocated by him publicly said in substance this:

"The street car situation of Toledo is in the hands of a friend of the Rail-Light". (Meaning that the judge of said court so entertaining said questions as aforesaid was biased and unduly favorable toward the plaintiffs and the defendant The Toledo Railways & Light Company, whom said John Quinlivan then and there intended to designate by the term "Rail-Light".)

"Judge Killits" (meaning the judge of said court so considering said matters as aforesaid) "has demonstrated from the first that he was at all times favorable to the Rail-Light". (Said John Quinlivan intending thereby to be understood as meaning and asserting that the judge of said court at all times was unduly favorable to the movants of the aforesaid motions and because of bias and partisanship was incapable of performing his official duty as judge of said court in said matters.)

"Any fair-minded citizen will see that when Killits" (meaning the judge of said court aforesaid) "placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolutions and let our federal friend" (intending thereby to mean the judge of said court as aforesaid) "know what we think of him". "The burden of proof should have been placed on the Rail-Light". (Meaning the movants of said motions.) "Killits" (meaning the judge of said court as aforesaid) "and the press are preparing to hand the people a lemon". (Said John Quinlivan thereby intending to be understood to say that this court was about to render a judgment and decree upon said motions based upon considerations other than those demanded by the law and the evidence.)

"They" (meaning the judge of said court aforesaid and the press of the city of Toledo) "are unfair to the people" (intending thereby to mean and to be understood as meaning that the judge of said court so considering the matters as aforesaid was biased and prejudiced against the people of the city of Toledo and in favor of the movants of said motions respecting the issues made thereby).

"Impeach Killits" (intending thereby to advise and demand that the judge of said court, because of the aforesaid assumptions of said Quinlivan, as to the anticipated action of this court in said cause, should be attacked in his official position).

That owing to the influence of said Quinlivan as an officer and influential member of said Central Labor Union, and because of the aforesaid statements and charges by him made and other statements and charges

of similar tenor then and there made by him, numerous citizens of the city of Toledo then attending said meeting were induced to and did criticise and attack the judge of this court so then having under consideration said questions as aforesaid, in similar tenor and effect and with respect to this cause; and that, as a further result of the said conduct of said Quinlivan and those so incited by him, said Central Labor Union was persuaded to and did adopt a resolution or order instructing the legislative and executive committees of said organization to investigate and report at the next meeting thereof the feasability of starting impeachment proceedings against the judge of said court so entertaining said questions as aforesaid provided said court determined the questions involved in said motions in favor of the movants.

The court further finds that the aforesaid matters and the conduct of said Quinlivan inciting the same and with reference thereto, as above set out, are matters which are liable to obstruct the due administration of justice, weaken and lessen in the estimation of all citizens influenced by said Quinlivan and his followers the proper authority of this court, and that said Quinlivan, in his conduct as aforesaid, intended that thereby this court should be intimidated in the due performance of its duty in this cause and, in addition thereto, its due authority should be limited and obstructed and its attempts to administer justice be thwarted and constitutes a contempt of the authority of this court. And the court further finds that the conduct of said Quinlivan at such time and the results thereof as influenced by the same, as above set out, were calculated to, and were intended by said Quinlivan to, excite resistance and disobedience to any order of this court in the premises which might not meet the approval of said Quinlivan and his associates as members of said organization.

It Is Therefore Ordered that the said John Quinlivan be forthwith served with a copy of this order, and that he be, and he is hereby, notified to be and appear before this court on the 12th day of September, 1914, at 2:30 o'clock in the afternoon, there to show cause why he should not be dealt with as one in contempt of the authority of this court touching this cause, if it should appear from testimony then to be taken and evidence to be heard that the aforesaid things above charged to said Quinlivan are substantially true, and, in default of the appearance then and there of said John Quinlivan in obedience to this order, the marshal of this court is instructed and he shall, as

soon thereafter as possible, apprehend said John Quinlivan and him safely keep until such convenient season as will enable the marshal to have the body of said John Quinlivan before the court to answer as aforesaid.

John M. Killits,
United States District Judge.

September 11, 1914.

The United States of America,
Northern District of Ohio,
Western Division, ss:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Order, filed September 11, 1914, and entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 11th day of September, A. D. 1914, and in the 139th year of the Indepence of the United States of America.

(Seal) B. C. Miller, Clerk,
By J. W. Wilson,
Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 2W.

The United States of America,
Northern District of Ohio,
Western Division, SS:

At a stated term of the District Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the last Tuesday in April being the 28 day of said month, in the year of our Lord, one thousand nine hundred and fourteen, and of the Inpendence of the United States of America, the one hundred and thirty-eighth, to-wit: on Saturday, the 12 day of September, A. D. 1914.

Present: Honorable John M. Killits, United States District Judge.

Among the proceedings then and there had were the following, to-wit:

Plaintiff's Exhibit No. 2W.

In Equity No. 86.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the firm name and style of Henry L. Doherty & Company,

Plaintiffs,

vs.

The Toledo Railways & Light Company, and The City of Toledo,

Defendants.

INJUNCTION.

This 12th day of September, 1914, this cause came on for hearing on the separate motions of the plaintiffs and of the defendant, The Toledo Railways & Light Company, for the issuance of a temporary injunction herein against the city of Toledo; and after hearing the evidence and the arguments of counsel, the court, being fully advised in the premises, finds that, pending the final determination herein of the rights of the parties, a temporary injunction should issue herein.

It is accordingly ordered by the court that the city of Toledo, its officers, agents, employes, and all other parties, and persons whomsoever, to whom notice hereof is or may be given, and each of them, are hereby enjoined and restrained, until the further order of this court, from asserting, enforcing or attempting to assert or enforce, the rates of fare, or any of the terms and provisions of a certain ordinance, passed by the council of the city of Toledo on November 24, 1913, as set forth in paragraph 11 of the amended cross-bill filed herein by the defendant, The Toledo Railways & Light Company, by which ordinance it was provided that The Toledo Railways & Light Company should not charge to exceed the sum of three cents (3¢) for each passenger; and the said persons and parties, and each of them, are hereby further enjoined and restrained, until the further order of the Court herein, from interfering and attempting to interfere with the withdrawal by the defendant, The Toledo Railways & Light Company, should it attempt to do so, of its cars from the streets of the city of Toledo upon which its franchises have expired, and the storing of said cars by said defendant, The Toledo Railways & Light Company, in such place as it may deem best.

It is ordered that the foregoing injunction and restraining order shall go into effect at 12:00 o'clock noon, Tuesday, September 15, 1914, upon the giving of bond by The Toledo Railways & Light Company, with security to be approved by the court, in the sum of $1000.00.

Thereupon bond in said amount was duly given by said defendant, The Toledo Railways & Light Company, and approved by the court.

The United States of America,
Northern District of Ohio,
Western Division, SS:

I, B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original Injunction entered upon the Journal of the proceedings of said Court in the therein entitled cause, at the term, and on the day therein named; and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 22 day of September A. D. 1914 and in the 139 year of the Independence of the United States of America.

(Seal)

B. C. Miller, Clerk,
By F. W. Gaines,
Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 2X.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

In Equity. No. 86.

Henry L. Doherty, Charles T. Brown and Frank W. Frueauff, partners doing business under the name and style of Henry L. Doherty & Company,

vs.

The Toledo Railways & Light Company.

DOCKET ENTRIES.

No. 86. Equity.

Jan. 16, 1914. Bill filed.

16 Subpoena issued. Rule for answer Feby. 5, 1914.

	20	Subpoena returned and filed endorsed by Marshal as follows: "U. S. Marshal's No. 6542. The United States of America, Northern District of Ohio, ss. U. S. Marshal's Return. Received this writ at Toledo, Ohio, January 16th, 1914, and on the same day at the same place, I served it on the within named The Toledo Railways & Light Company, by delivering to Frank R. Coates, President of the said The Toledo Railways & Light Company, personally, a true and certified copy hereof with all endorsements thereon. Marshal's Fees. Service $2.00. Travel .12= $2.12. Chas. W. Lapp, U. S. Marshal, By E. A. Brown, Deputy.
	26	Motion for appointment of a Receiver filed.
Feb.	2, 1914.	Stipulation extending time for answer filed.
	2	Order extending time for answer to first Monday in April entered. E. J. 1-274.
Mar.	24, 1914.	Motion for leave to file supplement and Amendment to Bill filed.
	24	Leave to file Amendment and Supplement to bill entered and filed O. B. 1-50.
	24	Amendment and Supplement to Bill filed.
	24	Precipe filed.
	24	Subpoena for City of Toledo, issued. Returnable April 13, 1914.
	28	Answer to Bill filed.
	24	Copy Amendment and Supplement to Bill mailed City Solicitor Toledo.
	24	Motion of plaintiff for Temporary Injunction filed.
	24	Cross-Bill of The Toledo Railways & Light Co. filed.
	24	Motion of The Toledo Railways & Light Co. for Temporary Injunction filed.
	24	Copy Motion of Pltff. for injunction to City Solicitor.
	24	Copy Answer of dft. furnished to City Solicitor.
	25	Praecipe filed & 1 subpoena issued for 1 Pltffs. Witness.
	25	Affidavit of Frank R. Coates filed by Pltff.
Mar.	25, 1914.	Copy Affidavit of Frank R. Coates handed City Solicitor.
	25	Copy Motion of Rys. Co. for injunction handed City Solicitor.

	25	Copy Cross-Bill of Rys. Co. handed City Solicitor.
	26	Subpoena returned with Marshal's return endorsed thereon as follows: "U. S. Marshal's No. 6668. The United States of America, Northern District of Ohio, ss. U. S. Marshal's Return. Received this writ at Toledo, Ohio, March 24th, 1914, and on same day at same place, I served it on the within named The City of Toledo by delivering to Carl H. Keller, Mayor of the City of Toledo, personally a true and certified copy hereof, with all endorsements thereon. Marshal's Fees. Service $2.00 Travel .06, $2.06. Chas. W. Lapp, U. S. Marshal. By H. J. Bartley, Deputy." & filed.
	27	Motion for Temporary Restraining order filed.
	28	1 sub. returned & filed—30 cts.
	30	Amended Cross-Bill filed.
	30	
	30	Opinion filed.
	28	Leave to amend pleadings entered & filed. E. J. 1-347.
		Certifying, Reporting & swearing one witness for Plff.—Carl Nau, $12.30.
July	22	Motion for leave to file amended cross-bill filed.
	22	Leave to file amended cross-bill filed & entered. E. J. 1-423.
Aug.	7	Amendment & Supplement of Tol. Rys. & Light Co. to Cross-Bill filed.
	8	Motion for temporary injunction filed.
	13	Copy Amendment & Supplement to Cross bill furnished City Solicitor.
	14	Motion to dismiss filed by City of Toledo.
	14	Copy Motion to dismiss mailed R. Fuller.
	15	Order—motion to dismiss as to deft. City of Toledo overruled, entered & filed. E. J. 1-425.
	22	Answer to Amended Bill filed.
	22	Answer to Cross-Bill & Supplement filed.
	24	Copy Answer to Cross-Bill to Rathbun Fuller.
Aug.	24, 1914.	Copy Answer to Amended Bill to T. H. Tracy.
	24	Copy Answer to Cross-Bill & Supplement to T. H. Tracy.

Plaintiff's Exhibit No. 2X.

Sept.	8	Affidavit Frank R. Coates filed.
	8	" Edward R. Kelsey, Raymond Skinner, Clarence E. Murray, filed.
	8	Affidavit Peter Witt, filed.
	8	Trial begun. E. J. 1-427.
	9	Answer to Amended Cross Bill filed.
	9	Leave to file Answer to Cross Bill entered. E. J. 1-428.
	11	Order for John Quinlivan to show cause filed & entered. E. J. 1-429.
	11	2 Cert. copies to Marshal for service.
	11	Order for August Smith & E. P. Usher to appear as witnesses filed & entered. E. J. 1-433.
	11	3 Cert. copies order to Marshal for service.
	12	Memorandum opinion filed.
	12	Injunction order filed & entered. E. J. 1-439.
	12	Injunction Bond approved & filed.
	12	Hearing as to John Quinlivan continued to Sep. 16, 1914—order entered & filed. E. J. 1-440.
	16	Hearing as to John Quinlivan continued to Sep. 21, 1914—order entered & filed. E. J. 1-443.
	16	Cert. copy order on John Quinlivan returned (served) & filed. $2.06.
	18	Cert. copy order on August Smith & returned (served) & filed. $4.18.
	21	Hearing as to John Quinlivan continued until after case of U. S. v. Toledo Newspaper Co.,—order entered & filed. E. J. 1-444.

The United States of America, Northern District of Ohio, Western Division, ss:

I. B. C. Miller, Clerk of the District Court of the United States within and for said District, do hereby certify that I have compared the within and foregoing transcript with the original entries entered upon the Appearance Docket of said Court in the therein entitled cause, and do further certify that the same is a true, full and complete transcript and copy thereof.

Witness, my official signature and the seal of said Court, at Toledo, in said District, this 6th day of November, A. D. 1914, and in the 139th year of the Independence of the United States of America. B. C. Miller, Clerk,

(Seal.) By F. W. Gaines, Deputy Clerk.

PLAINTIFFS' EXHIBIT No. 3.

MURPHEY READY IF TROUBLE STARTED

Fearing trouble of some kind, Chief of Police Murphey made his headquarters Friday evening in the private office of Mayor Keller, right at his superior's elbow.

Murphey said that he had kept the police shift known as the 3-11s on duty after their shift had passed, in order to be ready to take care of anything that might come up.

"We had about 100 men ready for duty," said the chief.

"Say, lieutenant," the chief telephoned central police station, "have the boys warm up their motocycles. They may be needed quick somewhere."

"Not overlooking any bets," observed Mayor Keller, casually.

"And say, lientenant," said the chief, "you'd better send about three, no, four men up to the 12 o'clock line-up on Summit-st. And say, lieutenant, don't send 'em up in a crowd, see, like they were lookin' for trouble. Just send 'em up peaceful like. You know how to do it. Have them just walking along."

"I don't think we will have any trouble," said the chief, and he guessed that right, for there wasn't a complaint at either police station.

"How could there be?" he asked, after the night's excitement was all over, "when the company let people that didn't want to pay more ride free?"

PLAINTIFFS' EXHIBIT No. 3.

THOUSANDS OF WORKMEN RIDE WITHOUT PAYING

In the Overland district, where there had been anticipation of trouble when the workmen from the affiliated plants boarded the cars on Saturday at noon, everything went smoothly. Passengers and thousands of employes were equally good-natured. The conductors pursued the same policy as elsewhere, collecting five cent fares or the brown tickets when they could get them and refusing all green (three cent) tickets and three-cent fares.

Where a passenger refused to pay the fare asked, he was allowed to ride for nothing. On one car leaving the

district the conductor collected four fares. On another the conductor collected two fares. Both cars were crowded.

OFFICIALS' ACT BASIS.

City Solicitor Thurstin's petition to common pleas court for a mandamus which it is expected will be filed early next week probably will be based on the experience of Councilman John Mulholland after the mass meeting of Friday night. The city solicitor's department has had no report of anyone having been put off a car or refused passage because of declining to pay more than three cents.

Mulholland, boarding the car after midnight, proffered three cents. The conductor refused it. Mulholland asked, "What do you want?" The conductor said, "A brown ticket or five cents." Mulholland then paid five cents.

HOLD IT'S REFUSAL.

The city solicitor's department will construe this as a refusal of the company to accept the three-cent ordinance and a determination to enforce the old rates of fare. The petition will probably ask that the courts order the company to accept the three-cent ordinance.

PLAINTIFFS' EXHIBIT No. 3.

THOUSANDS ARE RIDING FREE;

KILLITS HEARS BIG CON PLEA.

Federal Judge Takes Up Both Questions of Jurisdiction and Fairness of Three-Cent Rule.

In Factory District Company Continues Policy of Passing Men Who Refuse to Pay Higher Fare — Few Workingmen Give Up Brown Tickets or Coin.

Jurisdiction of the United States Court in the matter of the Toledo Franchise fight was argued before United States Judge John M. Killits, on Saturday. This, with the admission of evidence on the part of the Company to sustain its plea for an injunction against the city, occupied all day.

While considering argument as to his right to go into the case, the court admitted evidence on the part of the company, and said he was willing also to hear testimony on the part of the city, "to save time", he said.

In the meantime, there was no trouble. Everyone was riding free during the hours of regular fare if he or she possessed the nerve to refuse the regular fare and insist on the three-cent rate. The conductors were still under orders to allow passengers to ride free, rather than accept the three-cent fare, except in the morning and evening. It is expected that this condition will obtain over Sunday. The conductor demands a brown ticket or five cents. If he does not get either, he passes on, rejecting the proffer of three cents. But a majority seem to prefer paying the regular fare rather than have even a minor dispute.

COMPANY APPEALS TO SENTIMENT OF PUBLIC.

The company proposes making an appeal to public sentiment, at a public meeting called for Saturday evening. Henry L. Doherty, who was refused a hearing at the municipal ownership mass meeting at Memorial Hall on Friday evening, on Saturday morning rented that hall from the city for Saturday evening. He at once extended an invitation to Mayor Keller, the members of the City Solicitor's department, and other city officials, and especially Councilman John Mulholland, Chairman of the Municipal Ownership Meeting, to be present and speak. Doherty will speak, as will Thomas H. Tracy and other advocates of the Company.

Question of whether the franchises expired on Friday night or were extended to October 6th, 1915, is going to have a hearing in determining whether the Federal Court has jurisdiction in the application of the Big Con and Doherty & Co. for a temporary restraining order against the City. This was made plain on Saturday, when the hearing of the application was taken up at 10 o'clock.

"If these franchises do continue for eighteen months then the question is brought within the range of Detroit and Cleveland cases, where the Court had jurisdiction," Judge Killits said. Statement was made after Solicitor Thurston in making an argument for the dismissal of the application on the ground of lack of jurisdiction, had pointed to the inconsistencies in the suits of the Doherty Company and the Big Con in which one side claims franchises have not expired and the other makes no such claim.

"Under the Schreiber ordinance, until the city moves against the Big Con, the Court could not have jurisdiction," Solicitor Thurstin said.

THURSTIN WON'T CONCEDE FEDERAL JURISDICTION

"Do you concede then that the court would then have jurisdiction?" asked Judge Killits.

"No, I wouldn't say that," Thurstin said.

"The point I am making," Thurstin continued, "is that I say the city of Toledo cannot be forced in here when an action is pending in common pleas court. It isn't just to put the city to that additional litigation. Why didn't they ask for a receiver in common pleas court?"

Judge Killits said: "This court must pass on matters brought in here. There is nothing in the record about the common pleas case. Whether the franchises expired last night or continue until next October makes a great deal of difference in the question of jurisdiction. Assuming that the common pleas record is in this case, it is only half of the question."

The case opened sharply at 10 o'clock. The first hour was consumed when Big Con and Doherty lawyers were authorized to strike out one paragraph in its bill and supplement another. Then Attorney Tracy began the introduction of evidence to which Solicitor Thurstin objected.

COURT ADVISES HEARING THE TESTIMONY

"I would suggest that if you are interested in making progress you let this evidence be introduced," the court advised.

Copies of the various ordinances and papers in the case, certified copy of the affidavit of Frank R. Coates, President of the Big Con, relating to earnings and expense of the company was introduced.

Carl Nau, of the firm of Nau, Rusk & Swearingen, Cleveland accounts, who examined the Big Con's books, covering a period of eleven years for the City of Toledo, testified that total expenses of the Big Con in 1912, if three cent fare had been in effect, would have been $13,-974.45 more than earnings, not taking into consideration taxes, the $250. rental ordinance or interest on investment. This would have added $201,000, he said.

Nau said the per passenger gross earnings would have been 2.33 cents and that total receipts from the entire operation would have ben 2.61 cents per passenger. He said the expense per total passenger was 2.81 cents, and including rental and taxes, it would have been 2.97, assuming that the same number of people had been carried.

Nau said that in none of the examinations he had made had interest on the investment, the $250. rental

ordinance or taxes been taken into consideration. Nau denied, on cross-examination by Solicitor Thurstin, that he was employed by the Big Con or Doherty. He said that in his opinion the one cent per kilowatt charged against the Big Con for power was fair, and that the Big Con paid $280,000. for current to the power company in 1912.

THURSTIN QUESTIONS THE COURT'S AUTHORITY

Thurstin then raised the question of jurisdiction, and began his argument. He said he would like to know how the city of Toledo came into the action. He said he was at a loss to determine and that he had not been served with a notice.

"I don't know whether you ask that for rhetorical effect," laughed Judge Killits, "but I will ask council for the other side to answer it for you."

Attorney Tracy said the record spoke for itself and that the return showed notice had been served on Mayor Keller.

Thurstin reviewed the history of the Doherty receivership suit and declared that it was evident "these gentlemen have come in here to wash their dirty linen and incidentally to take advantage of the court and the city of Toledo." He declared that the bill of Doherty & Co. and the Big Con's case were collusive.

THURSTIN READY TO SUE

Encouraged by Federal Judge Killits statement that he doubted whether he had jurisdiction of the Big Con's suit to prevent the enforcement of the ordinance, City Solicitor Thurstin was ready on Saturday morning to file his suit in the state courts to compel the Big Con to accept three-cent fares all day and to pay $250. a day rental.

The only thing that prevented the solicitor's action was his professional word, given to Judge Killits late on Friday, that he would do nothing before the judge decided what he would do with the Big Con's request for an injunction restraining the enforcement of the ordinance.

ALL MAY RIDE FREE

Those who refused to pay more than three cents fare, except during "Three-cent hours", 5:30 to 7:30 A. M., and 4:30 to 6:30 P. M., were being carried free of charge by the Big Con on Saturday as a result of the following order issued to Big Con conductors by Supt. Enright late on Friday night:

"Accept nothing but the regular cash or ticket fares. Use every peaceable means to collect this fare, but in no case are you to resort to violence or force."

"Do not under any circumstances, eject passengers forcibly from the cars, or use harsh language in arguing with passengers.

"Do not, under any circumstances, accept a three-cent fare, except during regular three-cent hours. If necessary, carry any passenger for nothing in order to maintain your regular schedule.

"Keep a careful count of those who refuse to pay the regular fare.

"By order of President F. R. Coates."

The order will remain in effect until Judge Killits hands down his decision in the Big Con restraining order hearing, now in progress in Federal Court.

ENCOUNTER LITTLE TROUBLE.

As a result of the order very little trouble was encountered and only a comparatively few of the total number of riders insisted an paying only three cents.

A big crowd was on hand down town, waiting for the midnight "line-up", but it was good natured. Big Con employes, city officials, and the police mixed freely with the crowds.

When the line-up cars pulled up, there were on them in Big Con uniforms three, four and five extra men. The largest crowd gathered at St. Clair and Adams street to see Mayor Keller board a car to pay the first three-cent fare. Included in this crowd were President Frank Coates, his assistant, T. Lee Miller, and other officers of the company.

DOHERTY TRAILS MAYOR.

In an effort not to attract attention, Mayor Keller and a party of ten or twelve city officials left the offices shortly before midnight and were hurried in autos out Adams Street. Henry L. Doherty, who had been watching for the mayor, followed in the machine of D. C. Bailey, claim agent of the company.

Mayor Keller and his party boarded an inbound car at Collingwood and Delaware-aves. Doherty was standing by the conductor when Keller entered and paid the fares for the Mayor and his party.

OUTWITS HIM AGAIN.

After riding a few blocks, the Mayor decided to make another attempt to furnish the groundwork for a three-

cent fare test by paying his fare. But again Doherty was ahead of him, and when Mayor Keller and party boarded long belt car No. 667, at Ashland and Collingwood, Doherty again paid all fares.

Doherty was on the jump throughout the night. At the Memorial Hall mass meeting, under the auspices of the Toledo Municipal Ownership League, the head of the Big Con in its fight for a new franchise, was refused a hearing. Doherty arose and asked to be heard.

John Mulholland, presiding officer, refused the request on the grounds that there was a regular program which could not be interrupted. The meeting greeted Mulholland's decision with applause, hisses and yells of "Doherty."

KILLITS IS NOT SURE.

One of the most important events of the day developed at 4 o'clock on Friday afternoon when Big Con and Doherty lawyers, scared by Solicitor Thurstin's statement that he would file in common pleas court application for an order compelling the company to accept three-cent fares, rushed before Judge Killits with a motion for a temporary restraining order against the city, Judge Killits, after hearing both sides, made it plain that he would refuse to issue a restraining order and questioned the jurisdiction of his court in the Big Con case.

A decision on the motion was avoided when Solicitor Thurstin gave his professional word that he would not press for hearing any application for a restraining order.

FEDERAL JUDGE HESITATES.

In his statement to the attorneys, however, Judge Killits said: "I have had an opportunity to examine the Schreiber ordinance and I have some hesitency in saying whether this court has jurisdiction at all. This court would hesitate a long time before interfeing with an official of the city doing his duty.

"If these franchises expire tonight (Friday), we must concede that the streets belong to the city and the company can occupy them only under the terms proposed by the city."

To be in a position to handle any trouble that might arise, Chief of Police Murphey established temporary quarters at the Mayor's office. The "3-11" police shift was kept on duty for two or three hours so that a reserve of one hundred men were on hand to put down any rioting that might develop.

CHART

TOO

LARGE

FOR

FILMING

PLAINTIFFS' EXHIBIT No. 3.

DOHERTY TO HOLD A MASS MEETING; ASKS OFFICIALS.

Henry L. Doherty, head of the Big Con operating department, who was refused an opportunity to address the municipal ownership mass meeting at Memorial Hall on Friday night, has rented the hall for Saturday night and will hold a mass meeting of his own at 8 o'clock.

Special invitations have been extended to Mayor Keller, the city council, City Solicitor Thurstin, W. W. Campbell, Chairman of the executive committee of the Municipal Ownership league, and to John Mulholland, chairman of the Friday night meeting, who refused to allow Doherty to address the meeting, and to all members of the Toledo Municipal Ownership league.

Doherty announced that he "will present some of the features of the franchise situation as accurately as possible."

To the mayor Doherty wrote that he appreciated the intense interest the people of Toledo have in the street railway situation, and that he believed they desired to be fully informed on all sides of the question that confronts them. Hence the meeting of Saturday night. He expressed a desire that the mayor express his views upon the situation and also upon the best method of settlement.

To Mulholland, Doherty wrote that he regretted that he had not been given an opportunity to be heard, and that he would have persisted had it not been for the chairman's remark that no one would be allowed to stampede the meeting. He said that he did not wish to argue the principles of municipal ownership, "but simply in the name of fair play to correct some erroneous and misleading statements which had been made."

Mulholland has been asked, if any exaggerated or erroneous statements are made on Saturday night, to correct them from the floor.

OFFICIALS WILL ATTEND.

Mayor Keller said on Saturday that in all likelihood, because of two or three previous engagements, he would not be able to accept Doherty's invitation. Other city officials, and Members of the Municipal Ownership league, have signified their intentions to be present.

Service Director Boardman gladly rented Memorial Hall, to Ben Baum, representing Doherty, early on Saturday morning.

"I believe in fair play," said the service director, "and I told Mr. Doherty I was glad to give him the hall for his meeting."

Doherty said: "When I arose at the meeting of the league on Friday night and asked to be heard, I did not know that a formal program had been arranged. I only wish to give the company's side of this question. I'm not afraid of the judgment of the people if they know all the facts."

PLAINTIFFS' EXHIBIT No. 9.

Toledo Times, June 16, 1914.

SO THE PEOPLE MAY KNOW

The situation that confronts Toledo today is not primarily an issue between the street railway company and the city.

Big as that issue may be, it is a mere dwarf compared with the real issue.

The real issue at stake is one that concerns the future of the city of Toledo.

The lawless element, or those who through fear, malice or misunderstanding follow the lawless element, are taking away from us over one thousand dollars a day in payment for the car service we furnish.

They might just as well reach by force into our cash drawers and take by force the same amount of money from there.

They might just as well take every day one thousand dollars worth of our tools or our tracks.

If they can take our property by force today, they can on some other pretext take your property tomorrow.

If they can take our property today and your property tomorrow, they can next year or five years hence take the property that is still to be built and created in Toledo.

If they can take our property today and yours tomorrow, then they can take by force the property that other people are already planning to build in Toledo.

What is the answer?

IF THIS SITUATION IS KEPT UP AND THIS COUTROVERSY IS NOT SOLVED IN A LAWFUL AND EQUITABLE MANNER MANY OF THESE NEW PROPERTIES WILL NEVER BE BUILT OR CREATED IN TOLEDO.

The new properties will be built or created some place else.

At some point where it has been demonstrated that property will not be taken unfairly and by force.

Or at least, new properties cannot be built where it has been demonstrated that property has been taken unfairly, lawlessly and by force.

The present situation is encouraging further lawlessness and rowdyism.

It has become difficult for us to enforce the simple rules which are necessary to insure the safety and convenience of our patrons.

If rowdyism continues to grow, others will suffer sooner or later from the overflow.

Every old time and experienced police officer knows that the only safe way to preserve order is by keeping rowdyism continually in check.

That is the only way the lawless element can be controlled with a small police force.

Where the lawless element is kept thoroughly in check it needs only one citizen out of every 1,000 to act as a policeman and preserve order.

Rowdyism, if encouraged or allowed to go unchecked in one direction, always leads to rowdyism in some other direction.

WHAT WE ARE SUFFERING FROM TODAY, YOU, MR. GOOD CITIZEN, WILL GET WITH ACCUMULATED FORCE ON SOME TOMORROW.

Rowdyism and lawlessness are a continual menace to the liberty and happiness of all good citizens and to the stability of the government itself.

Rowdyism and lawlessness are like a fire—they find their own food on which to grow.

There is nearly always a time when a fire is of no particular danger.

It can easily be put out.

There sometimes comes a time when no human power will control the fire until it has burned itself out.

Rowdyism and lawlessness must be handled like a fire—only delay is still more dangerous.

The threat from lawlessness is not a dangerous one when it is confined to a small minority of plain citizens.

THE REAL DANGER COMES WHEN THOSE WHO HAVE BEEN CHOSEN TO MAKE AND CARRY OUT THE LAWS AND ENFORCE ORDER BECOME LAWLESS AND DISORDERLY THEMSELVES.

Illustrating in the biggest and most forceful way, it can be truthfully said that the downfall of many if not all of the republics which have failed has been because one or the other branch or arm of the government attempted to usurp some authority it did not possess.

We know that in the eyes of the modern reformer we simply prove ourselves to be out of date by harping back to George Washington, but these words from his farewell address are significant:

"But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

When the City Council attempted by the Schreiber ordinance to regulate the rate we should charge for our service, they attempted to usurp a power which they do not possess.

TO SAY THAT ANY ORDINANCE, NO MATTER HOW UNREASONABLE OR NO MATTER WHETHER PASSED WITHOUT ANY SUCH AUTHORITY BEING CONFERRED ON THE COUNCIL, MUST BE CONSIDERED BINDING ON EVERYBODY THEY ATTEMPT TO CONTROL UNTIL AFTER IT IS DECLARED ILLEGAL, IS PURE BUNK.

The first duty of the City Council is to keep within its own powers.

If this were not so, every City Council could simply block the machinery of the courts by passing indiscriminately ordinances pertaining to matters over which they have no power.

They could regulate the price of ice today, coal tomorrow, meat on Thursday, vegetables on Friday, rent on Saturday and then rest up Sunday so as to be ready for the strenuous duties of next week.

We are sorry to have to criticise anybody in the matter, but a situation like this could not exist if some one was not to blame.

We think the blame rests only on the Council and the city officials to the extent that they have accepted and have acted upon incorrect legal advice prompted by malice or due to incompetency or both.

When men have honest differences of opinion they endeavor by every means possible to reconcile them.

We can't even get the City Attorney's office to file a written opinion showing

1st. The provision in law which they think gives to the City Council the right to fix our rates without an agreement on our part.

2nd. That the Schreiber ordinance is a legal binding ordinance, and

3rd. What Judge Killits held in his opinion about the binding force of the ordinance.

We do not think that the members of the City Council and the city officials would willingly pass a non-enforceable ordinance and then attempt to compel us to accept it by the threat of being shot or clubbed by a policeman.

Such a thought would be repugnant to all good citizens.

It would be the tactics of the highwayman, not the chosen citizen, honored by public office and entrusted under oath to enforce the law.

AND YET THE SCHREIBER ORDINANCE CAN ONLY BE MADE BINDING UPON US IN THIS WAY.

What do you think is the spirit today which prompts the people to ride free?

Well, we will try and tell you.

Watch the free riders and see if you don't agree with the statement that most of them just want to get something for nothing, regardless of whether it is honestly gotten or not.

Most of these people slip onto the car in a shamefaced way, and hurriedly show the conductor three pennies and pass in.

These people are ashamed of what they are doing, but some of them become more calloused every day.

Then there is the rowdy element, and they are gradually becoming more numerous, more annoying and more bold.

They smoke in any part of the car that suits them and blow the smoke into ladies' faces.

They use vulgar and obscene language in the hearing of women and children.

THEY ASSUME THAT IF THE CONDUCTOR HAS NO RIGHT TO MAKE THEM PAY THEIR FARE, HE HAS NO RIGHT TO ENFORCE THE SIMPLE AND OBVIOUS RULES OF THE COMPANY THAT ARE NECESSARY FOR THE SAFETY AND CONVENIENCE OF THE PUBLIC.

We get letters every day praising us for our patience.

We are getting more praise on that score than we deserve.

We have been depending and are still depending, upon the unfailing belief on our part that the great majority of the people of this city believe in fair play and have the moral courage to demand it.

It has always been with us simply a question of how much time it would take for the lovers of fair play to see this matter in its true light.

How long it would take for the loyal citizens of Toledo to realize that a "fair deal" meant even more to the city of Toledo than to us.

There is no class of people as a whole whose big majority does not stand for the principles of fair play.

So, Mr. Good Citizen, no matter how big you may or may not be—how rich or how poor— it is up to you to see that everybody gets a fair deal.

We have not suggested to anyone what they could or should do.

It is simply a question of what your own position in life will enable you to do.

Right now we are not getting a fair deal in your city.

We want to be able to say that we did everything we could to prevent disorder and when the great mass of the fair people of Toledo understood the situation they took things in their own hands and secured for the good name of their city a fair deal.

A city with a reputation that the citizens could always be depended upon to secure a fair deal for every one, would look awfully good to a lot of people and particularly just now when business is stagnated the country over.

It would be the strongest invitation Toledo could give to new enterprises.

YOU CAN SCARE THEM AWAY OR MAKE THEM THINK TOLEDO IS THE BEST PLACE FOR THEM TO COME TO.

Which shall it be?

Yours Cordially,

TOLEDO RAILWAYS & LIGHT CO.

By HENRY L. DOHERTY.

PLAINTIFFS' EXHIBIT No. 10.

Toledo Times, June 2, 1914.

SO THE PEOPLE MAY KNOW

We have notified the city officials that we will commence to collect our regular rate of fare after today (Tuesday).

We have told the city officials that we desired to enforce our rights with as little friction and disorder as possible.

Up to now (11 o'clock Monday evening) we have had no response to our communication to the city officials.

It has come to our notice, unofficially, that the heads of the city government have had a meeting and have decided to enforce the Schreiber ordinance.

If our franchises have expired the city has lost all right to regulate our fares.

The only right the city has is to order us off the streets.

The matter is a plain proposition in law.

It really needs no corroboration.

However, our position has been decided in an opinion handed down by Judge Killits of the Federal Court.

The city attorney denies not only the plain legal proposition, but also says that Judge Killits' opinion does not hold to so state.

We have tried for weeks to get the city attorney's office to file a written opinion stating their position and what they hold is meant by Judge Killits' opinion.

Absolutely no action can be secured.

They should be willing to give a written opinion and stake their profesisonal reputation on the accuracy of it.

Is this asking them to do too much?

We say to you as we have said before that we have not had a fair deal.

We repeat it.

DO YOU SUPPOSE THAT ANY CORPORATION COULD MAKE A STATEMENT IN THE PUBLIC PRESS AND GET AWAY WITH IT, IF IT WERE NOT TRUE?

To use our exact words on a previous occasion, we said:

"We are getting the rawest kind of a raw deal."

You, Mr. Citizen, are pretty quick to "holler" if a corporation gives you a raw deal.

Well, if you stand for fair play you ought to be pretty quick to "holler" if a corporation gets a raw deal.

THERE IS GOING TO BE NO FREE RIDING AFTER TUESDAY—TODAY.

The city administration controls the police department.

No one knows what the city officials are going to do.

We have waited patiently for ten weeks to find out.

Yes, even offered to co-operate with them to prevent disorder.

We have accepted losses running way into the tens of thousands of dollars, rather than even risk discrediting the good name of the city of Toledo.

If we have not done all that we should and more, tell us about it and tell us quickly.

Hundreds of letters from the law-abiding citizens of Toledo, promising us that we shall have a fair deal, are coming to us every day.

WE NOW CALL ON THE WRITERS TO MAKE GOOD.

WE CALL ON THE LOVERS OF FAIR PLAY TO MAKE GOOD.

WE CALL ON ALL GOOD CITIZENS TO ENABLE US TO ENFORCE OUR PLAIN RIGHTS WITHOUT DISORDER OR DISCREDIT TO THE CITY.

Every good citizen of Toledo should understand that we have done all and more than anyone could with reason expect of us.

It looks as though the city officials are trying to invite disorder and discredit to the city, instead of trying to prevent it.

If the law-abiding citizens of this city are willing to permit this situation to persist, they cannot expect us to make further sacrifices to prevent a conflict.

THE SITUATION IS A SERIOUS ONE.

We thoroughly appreciate the fact.

It means much to us.

It means much more to the City of Toledo.

If you think that we are the only ones who need be worried over the situation, you are wrong.

There is no desire to deceive you.

We are worried.

Our worry, however, has not changed our opinion or our decision.

Our action is not from impulse.

No personal feelings govern our decision.

We cannot longer be made a football and maintain our own sense of doing what we believe is right.

WE CANNOT LONGER SIT IDLY BY AND ALLOW THE CONCLUSION TO BE DRAWN THAT JUSTICE CANNOT BE SECURED IN THIS COMMUNITY.

Our ability to get fair play in Toledo has so far seemed sure.

If we can't get it, we will take our medicine.

Yours Sincerely,

TOLEDO RYS. & LIGHT CO.

By Henry L. Doherty.

CHALLENGE TO SCANDAL MONGERS

I am informed by the evening papers that the City Attorney has had certain matters, that he thinks to be detrimenal to my character, printed and distributed to the members of the Council to prejudice them against me.

I have been a wage earner for more than a third of a century.

My record can be traced for every year.

THERE IS NOTHING IN MY BUSINESS CAREER TO BLUSH FOR.

To rehash everything that has transpired in even the past ten years would be a long and tiresome task.

But if the City Attorney or anyone else thinks they can tell anything against me that the people of Toledo should know, I hope he will SHOOT HIS WAD" and get the bile out of his system.

Give it all the publicity you want.

Lots of mean things have been said against me.

I didn't take time to reply to them.

I have lived my life according to my own light.

THERE IS NOTHING IN MY BUSINESS LIFE TO APOLOGIZE FOR.

There is a lot which I think deserves praise.

Years ago I realized that if the postman stopped to fight it out with every yellow cur that barked at him, he would never have time to deliver his mail.

So I have let much abuse go by unchallenged.

I may keep on doing it.

I am not, I believe, without a record and a good one.

We cannot discuss years of activity in a score or more of cities, but if the City Solicitor, or anyone else, thinks he can point to any one feature of my business career that will brand me as an undesirable person to the citizens of Toledo, LET HIM GO TO IT AND QUIT HINTING ABOUT IT, AND FOR ONCE I WILL ABANDON MY POLICY AND GIVE MY SIDE OF THE STORY,

SO THE PEOPLE MAY KNOW

and then you may

JUDGE FOR YOURSELF.

Yours Sincerely,

HENRY L. DOHERTY.

PLAINTIFFS' EXHIBIT No. 11.

Toledo Times, May 31, 1914.

SO THE PEOPLE MAY KNOW.

There comes a time in many things when patience ceases to be a virtue.

We are wondering if that time has not been reached in the present street railway situation.

We will tell you some of the details and we will tell you more from time to time if it is necessary.

You already know that the street railway problem has been made a political football for many years.

The blame for this has been laid to the company.

The present owners know nothing about these matters prior to one year ago when they came into possession of the property.

To be more exact they know nothing about it from personal experience.

They do know a whole lot about it from the voluntary testimony of parties to each side of the controversy.

If you will cultivate the acquaintance of any of the politicians of previous days we think they will tell you with a frankness and good nature that will immediately disarm you, "That the street railway problem was a good political issue and that it never could have been settled."

There is always some new twist that can be found to produce a delay.

In spite of years and years of delay, there are still many cheap political tricks that have not yet been sprung here in Toledo.

One that may be new here but an awful chestnut in most other communicities was sprung on Thursday evening.

An H. Whitford Jones after many rumors for many weeks filed this indefinite proposal:

To the Honorable Council of the City of Toledo:
Gentlemen—

I represent parties who are prepared to negotiate for a franchise for a period of twenty-five years, in general conformity with the report of the franchise committe of council, and are willing to deposit a certified check for $50,000 to the effect that they will enter into these negotiations.

The rate to be five tickets for fifteen cents and proper protection of transfer privileges, and the city to have control of the service.

Respectfully submitted,

H. WHITFORD JONES, Trustee.

We can't tell you who H. Whitford is or much less who he is trustee for.

If H. Whitford had presented an equally indefinite proposition in any responsible business office of sufficient magnitue to build a street railroad he would never have got past the reception clerk.

If H. Whitford falls down on filing his check or coming through with a bid it will be an easy matter to find an H. Washington Smith who will pick up the threads of negotiations where they broke off in the hands of H. Whitford Jones.

The next fellow won't have to be found—he will find himself.

WE MAY TELL YOU WHY IN A FUTURE INTERVIEW.

You can get at least six from sixty different cities.

We have been in the stage of what might be termed acute negotiations for 10 weeks or 70 days.

Six men times sixty cities times 70 days means twenty-five thousand two hundred days or about seventy years—that is, if our arithmetic is right. Seventy years of delay.

If there is one grain of seriousness in H. Whitford's desire to build a railroad he was unfortunate in his method.

Every man with any experience would treat it only as a joke.

If the city simply wants negotiations they can get them.

They can get them backed up by a certified check, and a certified check bearing some better relation to the magnitude of the proposition which is being negotiated for.

NEGOTIATIONS DON'T CARRY PASSENGERS OR FURNISH THE CAPITAL TO BUILD A CROSS-TOWN LINE.

The man who don't think would assume that $50,000 was a large sum of money.

It is, but not relatively.

In some branches of public work a cash bond is required of 20%.

Let's see what 20% would amount to.

The Cleveland Street Railway showed an inventoried value of about $94,000 per mile.

On this basis the Toledo properties would be worth about 11 million dollars.

Twenty per cent of this amount would be in excess of two mililon dollars.

Fifty thousand dollars is less than one-half of 1% of 11 million dollars.

It costs $42,000 to build a mile of single track in Toledo.

This is simply the track and overhead construction and does not provide anything for cars, car barns, real estate, tools, snow sweepers, etc.

Do your own figuring and then figure how much $50,000 amounts to.

But don't forget the $50,000 is only promised.

Not only that but not as a guarantee to build a railroad but to "negotiate."

Yet H. Whitford's proposition was responsible for the committee of the whole rejecting our proposition after ten weeks of conscientious negotiations.

We are wondering how long it will take the people of Toledo who want to see things conducted in a business-like manner to realize what is going on.

We wonder how long it is going to take the lovers of fair play to realize what is going on.

Last Tuesday the lobby of the council chamber was filled and the faces of many prominent business men could be seen.

It was the most intelligent looking audience we have ever seen there.

A good part of the evening was taken up in listening to one man with his back turned to the committee, harangue the people in the lobby about something which had nothing to do with the matter the committee had met to consider.

In the meantime the committee sat idly by.

The climax of a ridiculous situation was reached when another sepctator got up and solemnly moved "a point of order."

Another large part of the evening was taken up by a long tirade against the courts—all courts—by one of the representatives of the city attorney's office.

Last Thursday night an equally intelligent audience sat and listened to the "committee of the whole," under the guidance of the city attorney's office, solemnly pass resolutions without any authority of either law or reason, but in the language of one councilman who said "we do this so it will be thoroughly legal," or words to that effect.

At a previous meeting a demand from a councilman for a written statement of what Judge Killits' opinion covered, was answered orally by the statement of a representative of the city attorney's office that Judge Killits' opinion "did not rise to the dignity of a decision."

At Thursday night's meeting we learned from the city attorney that the previous advertisements for bids were not legally done.

So the "committee of the whole" proceeded under the direction of the city attorney to pass another resolution to provide for bids that was even more flagrantly illegal.

Do you wonder that we are wondering whether the the time has not come when patience has ceased to be a virtue?

While one circus was being enacted at the City Hall without much previous rehearsal another regular circus was going on in another part of the city.

Our company could have easily given a good example of what the lack of street railway service would mean.

Some of the serious-minded people of Toledo had urged us to do it.

They said, "Do something to make the people wake up."

We didn't do it.

We didn't even consider it.

We are doing our best to provide an adequate street railway service under conditions which are unfair and trying in the extreme.

We provided ample car service to move everybody.

It proved about the most flagrant case of free car riding we have yet had.

These non-pay riders could buy a seat for the circus but they would not pay a small sum for a reasonable service rendered and well rendered.

Not only that, but some of these free riders handed our conductors a few gratuitous insults.

So we didn't get a fair deal at either circus.

We have earned the ill will of the city attorney's office by calling their attention to some of the things in which they did not know the law or did not even seem to know the theory of the law.

We have heretofore done this quietly, respectfully and in a manner intended to cause as little embarrassment as possible.

In telling publicly in our columns about the wholly irregular and illegal proceedings which were passed at the committee meeting of the whole on Thursday night in the presence of and probably under the direction of the city solicitor and his assistants, we have probably earned their undying ill will.

But what are we to do?

The city solicitor and his assistants undertake to run the whole city administration, and the council as well, not simply on legal matters but on everything in connection with the street railway problem.

They deliver stump speeches on every occasion "that have nothing to do with the case."

They are so often wrong that if not checked and corrected they will prove a source of embarrassment to everybody—a source of embarrassment to the city and the citizens.

We have waded through this situation patiently for ten weeks, thinking that sooner or later the city officials and the members of the council would appreciate this situation.

The proceedings of Thursday night showed clearly that the majority of the members of the council have not yet reached the stage of appreciation.

Therefore we think patience has ceased to be a virtue and we are trying to give a hint to the people.

We are being subjected to the grossest injustice by reason of the city council being misguided as to their rights regarding the regulation of our fares.

We have accepted the loss of thousands of dollars rather than subject the city of Toledo to an open conflict as to what constituted right and justice.

We have even permitted all of this in the face of an opinion of the Federal Court sustaining our rights.

After ten weeks of negotiations with the city council we are apparently no nearer a solution of this problem than when we started.

We would like to not only say but also to think not only kind but complimentary things about everybody.

There is no unkindnes in what we have said here.

It is just a plain talk on a subject about which we could write a volume.

We have the voluntary pledges of many of the citizens of Toledo that we shall have a fair deal.

We are not getting it.

WE MAY HAVE TO CALL FOR A FULFULLMENT OF THESE PLEDGES.

We have never thought we could get a fair deal in a minute or a month.

It takes time for the people to understand.

We want them to think and understand for themselves.

This means you.

Think, study, and then

JUDGE FOR YOURSELF.

TOLEDO RAILWAYS & LIGHT CO.

By Henry L. Doherty.

PLAINTIFFS' EXHIBIT No. 12.

Toledo Times, April 13, 1914.

SPECIALISM.

We are specialists in the public utility business.

We believe in specializing.

If you came to us and wanted your portrait done in oil we would tell you to go to a specialist in this line of work, or perhaps we should say line of art.

Art can be made a business and business can be made an art.

If you insisted upon us painting your portrait you would probably get an awful daub.

When we came to Toledo it was our intention to do two things in particular. One was to make Toledo a brilliantly lighted city—a city that people would talk about and praise from ocean to ocean.

The other thing was to give Toledo a street railway system which would be the envy of other cities, clean, well lighted, smooth running cars and plenty of them.

We have a franchise for electric lighting and our rates are fixed. We have had no insurmountable obstacles placed in our road of progress towards making Toledo the city of brilliancy.

WE WILL STAKE OUR REPUTATION ON THE RESULT. TOLEDO WILL BECOME THE CITY OF BRILLIANCY.

Mark down this prediction and from time to time make up your mind whether this is a prophecy or a boast.

Make up your mind whether we are skilled workmen in our special line of public utility work or mere bunglers.

Make up your mind whether we can be made an asset to Toledo or not.

We mean to double our electrical business.

Think what it would mean to Toledo if every merchant and manufacturer would double his business in one year.

IF YOU WANT YOUR STREET RAILWAY SYSTEM HANDLED IN THE SAME WAY TAKE OFF THE HOBBLES THAT HAVE BEEN PLACED ON US AND WE WILL DO THE REST.

Business becomes an art when it is carried to high degree of efficiency.

A great business success was probably never attained by chasing the dollar but is due to pride in one's work—the pride that makes business an art.

We are for the moment being denied a rate of fare that will yield even operating expenses. We are expected to find the money to buy new equipment, build new tracks and pave the streets on a day-to-day lease.

WE CAN'T DO THAT SUM.

And we don't think anybody else can.

However, we will do the best we can under whatever conditions we have to work.

WE'RE NOT GOING TO SULK.

We're not looking for grievances but we are looking for encouragement.

We are not manipulators but operators.

We are not plutocrats but workmen and skilled workmen we have tried to make ourselves.

The older men in our organization came up in the school of hard knocks. The younger men are nearly all graduates of the leading engineering universities of the country, who after graduating from their university, spend two years in a special training school of our own. From twenty to forty fresh graduates come into our school every year. Not more than two from any univercity, the best in their class and preferably the boys who have worked their way through college.

WE CAN GIVE YOU A STREET RAILWAY SYSTEM OF WHICH YOU WILL BE PROUD.

Better service and economies of operation cannot be secured by passing ordinances. It requires thought and action, and thought and action along constructive lines.

We are willing to be judged by what we can demonstrate to you in the electrical department. If nobody throws a monkey wrench in the gear wheels there we can demonstrate our ability.

IF YOU WANT THE SAME RESULTS IN YOUR STREET RAILWAY SYSTEM TAKE OFF THE GAGS AND THE HANDCUFFS AND WE GO TO IT.

Yours sincerely, HENRY L. DOHERTY & CO.
TOLEDO RAILWAYS & LIGHT CO.

PLAINTIFFS' EXHIBIT No. 13.

Toledo Times, July 7, 1914.

SO THE PEOPLE MAY KNOW

A MESSAGE TO MUNICIPAL OWNERSHIP PETITIONERS.

Say the trains were not running, and you wanted to get to Detroit.

Say a lot of chauffeurs would stand in line and all tell you they had the best car and knew the best and shortest road.

You would probably pick the one that made the best "front."

If, instead of landing in Detroit, you landed in Columbus, who would you blame?

Would you blame the "trust?"

Would you blame your troubles to Rockefeller and Morgan?

Would you blame it to the courts?

No. You would just "cuss the chauffeur."

YET EVERY DAY THE PEOPLE ARE DAMNING WALL STREET, THE TRUSTS AND THE COURTS FOR THE PLAIN BLUNDERS OF THE CHAUFFEURS THEY HAVE CHOSEN THEMSELVES.

They pick the chauffeur who promises the most.

The one who wants the job worst will generally promise the most.

The one who wants the job the worst is probably the one who cannot get a job on merit.

The people have lots of problems to solve, and big ones.

These problems will never be solved in this generation or the next if the people continue to blindly follow self-constituted leaders who have only their own selfish ends to gain.

There is an old saying that "there is a sucker born every minute."

In fact, we probably are all born as "suckers."

We may be 100 per cent "sucker" at one stage of the game and never zero per cent "sucker" at any stage of the game

So the majority of us for the majority of the time are "suckers" in a greater or lesser degree.

The first evidence of the fact that we are not still 100 per cent "sucker" is when we can laugh when we find we have been made somebody else's clown.

So where the majority rules we have often found that we "suckers" have ruled.

Find a man who claims he has never been a "sucker," and you have found either a superhuman man, a fool or a liar.

The sad part of it all is that the "sucker" is often wiser than the man for whom he plays the clown.

BROKERAGE IN "SUCKERS" IS A REGULAR BUSINESS

Ninety per cent of the modern reformers and the self-constituted champions of the "peepul's" rights are just plain ordinary but cunning "sucker brokers," just like some other fellows are grain or cotton brokers.

God pity this poor old world if every "sucker" was a fool.

If that were so all regular human beings would be fools.

We can all be foolish at times without being fools.

Emotion of any sort lessens the accuracy of our judgment and makes us foolish in a greater or lesser degree.

Prejudice lessens our judgment more than any other emotion.

So is behooves every man to guard against his weakness towards hate and prejudice as a drunkard should guard against his weakness for drink.

Don't think that you are thinking for yourself when you are forming an opinion on somebody else's cunningly false or colored testimony.

BE FOREWARNED AGAINST TESTIMONY FROM ANY SOURCE WHICH TENDS TO INFLAME YOUR PASSION.

WHEN YOU READ OR HEAR ANYTHING WHICH AROUSES YOUR PASSIONS OR PREJUDICE OR HATE, STOP, LOOK AND LISTEN, FOR TEN CHANCES TO ONE YOU ARE BEING MADE AN UNPAID CLOWN TO SERVE THE SELFISH ENDS OF SOME "SUCKER BROKER."

AS TO MUNICIPAL OWNERSHIP.

I am informed that 9,000 people have signed a petition for municipal ownership.

It would be interesting to know how many of these petitioners are sincere believers in municipal ownership, and how many of them are victims of prejudice.

All the "sucker brokers" have for many years been inflaming the prejudice of the people against corporations in general.

Toledo has had her share of "sucker brokers" that have created a lot of prejudice, particularly against the Rail-Light Company for every real and imaginary sin that could be played up.

I do not believe in Municipal Ownership, but I do believe in meeting the issue on its merits fairly and squarely.

That is the reason I am speaking now.

INSTEAD OF LETTING THIS MATTER GO TO AN ELECTION WHICH WOULD BE A FARCE, I AM SPEAKING WHILE THERE IS STILL PLENTY OF TIME TO INVESTIGATE AND ACT.

I was hoping that someone else would point out the irregularities of this ordinance.

If what I give now is not enough, I will give more.

If the proposed ordinance, which it has been attempted to inaugurate by the Initiatory petitions now in the hands of the City Auditor, was really intended to bring about Municipal Ownership, it is then so foolishly planned and drawn that it can only be characterized as childish.

It is incompetent in many ways and yet if it were set aside by some court, the minds of perhaps thousands of the petitioners would be inflamed.

This is one of the numerous cases where the peop'e started out for Detroit and landed in Columbus.

Unfortunately it is one of those cases where they will blame Wall Street, the Courts and everybody else, instead of just blaming the chauffeur.

THE PROPOSED ORDINANCE IS NOT LEGAL.

NOT A BOND ISSUED UNDER ITS PROVISIONS COULD EVER BE SOLD EXCEPT TO "SUCKERS."

"Suckers" with money to buy bonds are awfully scarce.

People don't buy bonds from prejudice.

Prejudice is the best fertilizer ever discovered for "sucker" actions and the best anaesthetic for thought.

This ordinance, even if passed, cannot produce anything but confusion and litigation until it is abandoned.

MUST HAVE LEADERS.

If the people want municipal ownership, they must first select trustworthy and competent leadership.

I understand this ordinance was drawn under the direction of the City Attorney and its initiation inaugurated through the efforts of the City Attorney's office.

I have transacted business with many municipalities, and even with little villages up in Canada without railroad connections, and I have never seen such rank incompetency in the legal department of any city or village as has been shown by the City Attorney's office in Toledo.

During our franchise negotiations and the controversy over the Schreiber ordinance, I had interesting evidence of incompetency.

BUT ONE DAY, I DISCOVERED THAT THE CITY ATTORNEY HIMSELF DID NOT EVEN KNOW THE LAW REGARDING THE INITIATION AN REFERENDUM OF ORDINANCES.

We tried to explain the law to him, and one of my agents furnished him with a copy of the law as passed at the last session of the legislature.

He had this copy in his possession before the proposed municipal ownership petition was drawn, filed and put into circulation.

And yet, in spite of this fact, he allowed this, as he has allowed many other things to be done in a thoroughly illegal and irregular manner.

Don't think that I am "picking" on the City Attorney.

I have not an atom of ill will against him.

I don't know whether to be amused by him or to be sorry for him.

It would be a long job to point out all the incompetence of the proposed initiatory ordinance.

EVERY GAME MUST HAVE ITS RULES.

Spoiled children and spoiled grown up people always want to disregard the rules themselves, but enforce them against their opponents.

No one could have any games if these people had their way.

Every government must have its rules.

The rules for government are expressed by means of a constitution and laws.

Lots of spoiled grown up people always want to disregard both law and constitution when it is to their advantage to do it, and yet inforce them against all others.

They do "the spolied child" act every time a court decision goes against them.

Like the loser in a prize fight, they always blame it on the referee.

We couldn't have any government if these people had their way.

Plaintiffs' Exhibit No. 13.

The Constitution of the State of Ohio provides (except for laws of certain character) that no law shall take effect until ninety days after it has been passed and placed on file with the Secretary of State.

This is necessary to give the people an opportunity to protest by means of the Referendum provisions.

The present law, providing for the Initiation and Referendum of ordinances was filed with the Secretary of State on March 9th.

It therefore did not become effective until June 8th.

This law provides that before petitions are put in circulation, a copy of the proposed ordinance must be filed with the City Auditor.

No ordinance could legally be filed or circulated for signatures before June 8th.

IN SPITE OF THIS FACT, THE CITY ATTORNEY'S OFFICE IN THEIR USUAL BUMPTUOUS MANNER, FILED THIS ORDINANCE LONG BEFORE THE LAW WENT INTO EFFECT, AND STARTED OUT WITH BRASS BAND METHODS TO GET SIGNATURES FOR IT.

It is my humble opinion that for this reason alone, the proposed ordinance is not worth the paper it is written on.

However, I don't intend to attempt to force my opinion on anybody.

I also am of the huhmble opinion that if the City Attorney's office is let alone, they can be depended upon to make "monkeys" out of themselves and everybody that follows them.

However, I don't intend to try to force my opinion on anybody in this matter either.

FURTHERMORE, OUR COMPANY WILL NOT DIRECTLY OR INDIRECTLY ATTACK THE MUNICIPAL OWNERSHIP ORDINANCE IN THE COURTS.

We believe the ordinance is illegal, and we know it is impossible.

The most unfortunate thing in connection with this great blunder is the fact that all of the signatures on the present petitions, which were procured at great trouble by many honest and hard working people, will have to be thrown out and can never be used again because the signatures were procured and dated prematurely.

If the people of Toledo want continual agitation and confusion, we don't intend to throw ourselves into the

breach until the public thoroughly understand that our action is entirely unselfish.

We are just going to argue against agitation and confusion.

IF THE PEOPLE'S LEADERS ARE PLAYING PURELY FOR DELAY, AGITATION AND CONFUSION, WE ARE GOING TO TELL THE PEOPLE SO IN OUR ADVERTISING COLUMNS.

There won't be a grain of mean spirit in what we say.

We will also talk plainly and not in riddles.

We won't attempt to be the judge.

We will just tell you the facts and then let you JUDGE FOR YOURSELF.

Yours Sincerely,

HENRY L. DOHERTY.

DEFENDANT'S EXHIBIT No. 2.

September 9, 1914.

Afternoon session, hearing of Doherty & Company vs. The Toledo Railways & Light Company, et al.

Mr. Thurston:

If Your Honor please, there isn't a matter involved in this case of the fixing of a rate. That is a matter, I believe, we do not need to tender any citation or argument toward. The question, as Your Honor stated this morning, involved a constitutional question and the validity of the Schreiber ordinance and Your Honor goes no further than that towards fixing or establishing a rate.

The Court:

That is as far as I will go at this hearing.

Mr. Thurston:

We have a case, if Your Honor please, of Chicago, Milwaukee & St. Paul Railway Company vs. Tompkin, 176 U. S., 167, and particularly at the bottom of page 173; also the case of Knoxville vs. Water Co., in the 212 U. S., 1, and the same report in the case of Wilcox, et al. vs. Consolidated Gas Company, page 19 of the same report, and the case of Atchison Railway Co. vs. United States, in the 232—

The Court:

To what particular points are you making these citations?

Mr. Thurston:

In respect to the burden of proof upon the company and that they must show clearly the proposition of the rate being confiscatory.

Mr. Freuauff:

All of those cases showed some rate of return, didn't they?

Mr. Thurston:

And particularly this case which starts in at page 197, and particularly at page 221. That is all.

The Court:

Now, Mr. Thurston, on the facts before the court, are you contending that this ordinance, if attempted to be obeyed by the company, would meet the conditions the court imposed yesterday—pay running expenses and return on a fair valuation?

Mr. Thurston:

That is a matter of calculation from the evidence now in in the case, and our contention has merely been from the start that this ordinance that was passed Nov. 27, 1913, is a valid and legal ordinance of the city of Toledo, and as such, until it was repealed or passed upon by a court and held to be illegal, still remained valid and that the burden of proving it otherwise is and has been upon the company, that it is a prima facie valid ordinance and that the showing of the company must be so conclusive and clear, first, that it is confiscatory, and that they cannot operate under it. That is as far as we have gone in the matter. As to whether or not they can operate under those conditions, I think that the testimony in this case as to the figures submitted there is some question about.

The Court:

You will admit, will you not—the court is entitled to your assstance in correlating the facts and getting at the effect of the testimony relating to them—I am sure that you will say to the court that it is your opinion that if this ordinance does not provide for a revenue sufficient to meet the operating expenses, maintain the service which the city is entitled to and leave a surplus to make a fair return upon a reasonable valuation of the property involved, that it is confiscatory. There is no question about that, is there?

Mr. Thurston:

Indeed, I would, and further than that, I would never ask council or any city official to lend a hand in asking this company to operate if it could not make money. I believe it is entitled to it as long as it operates in the city of Toledo.

The Court:

Now, as we agree on that proposition, what is your judgment of the facts here?

Mr. Thurston:

If Your Honor please, aren't you rather putting me in an embarrassing position?

The Court:

No, I don't think I am. I think the court is warranted in asking you to advise the court as to what your views are and as occupying the relation you do to the city, after a hear-

ing here in which the very fullest opportunity has been accorded the city to present the facts, not the mere theory. I think that if you, as the result of all this opportunity, entertain an honest opinion that this ordinance is a mistake, you would do the city a service in saying so publicly. I am of the opinion, knowing you as I do—I am of the opinion that those facts so impress you.

Mr. Thurston:

I will preface these remarks, if Your Honor will pardon me, first, with the remark that Your Honor made yesterday, that the city of Toledo had not gotten to rock bottom in this matter, and the newspapers so quoted it last evening rather to the detriment of the solicitor's department. The solicitor's department put in hours and days on this matter, has worked on it harder than any one else in the city of Toledo, you might say, and we have come to but one conclusion, and those remarks were embarrassing to this department, because we felt that we had given it our conscientious attention and effort, and from the facts and the knowledge that we have gained in this entire matter all the way through, the showing of the company's books that we have gone through, that we have delved into, we have compared and gone outside and got testimony and information—we have not brought it into this case—and we are satisfied that the company has not, except as it might slide in a few slight items or anything which occurs in any bookkeeping—that the company has not attempted to conceal its cost of operation, and, under those conditions and knowing the circumstances as I do now and as I have known them from this investigation, I say that no man if he had had that information at the time would have been warranted in either fathering or signing an ordinance of that character.

The Court:

I am glad to hear you say that, and I am glad to know, as a citizen of this city, that the city solicitor's office is not responsible for this ordinance and inherited the problems that the ordinance has brought. Now, a propaganda has been persistent in this city for a good many years and has had for its effect the setting up of three cent fare as a sort of a sacred rate. It almost seems as though there are some people in the city who would refuse to pay 2.75 cents—they prefer to pay 3 cents because it is a sacred rate. Now, we all know that the city is suffering as the result of the confusion and bitterness that has arisen among our people over this problem. The city knows what the attitude of the present city administration has been toward this proposition, that the rate ought to be three cents. The solicitor's office and the administration has been consistent in its insistence on behalf of the city that the rate should be three cents. So that it cannot be said that, when

the cold fact is before the present representatives of the city that this ordinance is impracticable and cannot be enforced without a reduction of the mileage and a wiping out of unprofitable lines—at least, when that fact is apparent, as it is apparent in this court room today, it cannot be said, I say, that any representative of the city is doing anything else but a patriotic act in simply informing the people that have been misled that that is the situation, so that we may take a fresh start and get down to dispassionate, sensible, reasonable construction of this street car problem, to the end that it be some time settled. So I feel that if it is the honest opinion of the city solicitor's office, after it has exhausted every opportunity to know what the facts are and after the court has given it weeks and weeks to get into the secrets of this company and to know what is going on—if the city solicitor's office then is honestly of the opinion that it has inherited an impracticability, the office does itself a service and the public a patriotic service in simply saying so.

When this case was before the court last March, the court considered the Nau testimony and then reached the conclusion that there was a mistake made in the passage of this ordinance, that the ordinance did not afford a rate which would do anything more, if that much, than pay the bare running expenses of the company, but we declined then to grant a temporary injunction restraining its operation for the reason that, as we read the ordinance, we felt that, whether intentional or not, the ordinance was inoperative even if practicable, even if it did afford a sufficient rate, that the company might disregard it until that provision of the ordinance which directed the solicitor's office to go into a court of competent jurisdiction to get an order of enforcement had been observed, and we, therefore, declined to grant a temporary injunction to the company, under the control of a well known proposition that the court ought not to apply the extraordinary remedy of injunction so long as a remedy otherwise ample and complete remained with the applicant for an injunction. And it was very apparent that had the city solicitor gone into the Court of Common Pleas, being the only court open to him, to ask for an order enforcing this ordinance under that provision of the ordinance which gave him the authority and placed upon him the direction, that the very first question of fact for the Common Pleas Court to determine would be whether the ordinance afforded a sufficient rate to pay the operating expenses of the company and make a fair return upon a fair valuation of the capital involved in its management—precisely the question which this court would have been compelled to determine before it could possibly grant a temporary injunction, and that, therefore, the company had in the Common Pleas Court

the same remedy by way of defense as it had in this court by way of offense, and, that being the case, the rule would operate and this court would have no right to apply the extraordinary remedy of injunction. That was the reason why the company got no relief in this court last March, and the court was satisfied then and is still satisfied that the reason was controlling and good.

Now, the court did not dismiss that application for want of jurisdiction of the whole case, because the case continued here and the case was here with ample jurisdiction in this court—there is no question about that. We simply held, as I say, that the extraordinary remedy of injunction could not be resorted to. Now, that same question is before the court again. There is no fact appearing in this hearing these last two days touching the practicability from a business standpoint of this ordinance, or the question of its confiscatory character, that in any degree strengthens the court's impression on those propositions it had last March. There only remains whether the court is clothed with jurisdiction by reason of transactions happening since last March, to apply the extraordinary remedy of injunction, or whether the court is still where it was then, controlled by the principle to which I have alluded and compelled to say to the company, "You must wait until the city solicitor attacks you."

Now, I have some pretty vigorous notions on that proposition. I prefer, however, to express the conclusions of the court touching that particular question with more deliberation than I could employ orally from the bench, so I will take this matter under advisement for a day or two and formulate the court's conclusions concerning this application. I shall assume, when it comes to the question of fact, that the city has been unable with all diligence to sustain this ordinance as a practicable ordinance so far as the rate of fare is concerned, as applied to the existing conditions, and shall make that one of the elements of the court's judgment, in case the court determines that it has jurisdiction to make any pronouncement at all.

There isn't any question whatever but that there is a presumption that the council, in passing the ordinance, acted intelligently, fairly, impartially and with a desire to impose upon the company conditions with which the company could fairly comply, that the ordinance was passed in good faith. I say that is the presumption. It does not control. It is simply a presumption that obtains with reference to any act of a legislative body or the act of any official. The presumption runs in favor of the good faith of any official act. It is nothing more than an item

of evidence, a matter that stands to control only when not overturned by contrary evidence. In this case we find that the city of Toledo and its officers, in passing this ordinance, had the same information that the court has now, and had the same advice that the court has now that the ordinance was inoperative and confiscatory, and so it would be, if it were a judicial thing, competent for the court to say that notwithstanding the presumption which ordinarily protects an official act—if it were judicial to say, it would be entirely proper for the court to say that the conclusion is almost compelling that this ordinance was mere buncombe when it was passed. That is no reflection on the present city administration or any officer of the city, and the officers of the city, the present administration, have done only their duty in striving in proper ways to have this ordinance obeyed and in protecting the ordinance in these matters of litigation.

I am aware that these comments from the bench are somewhat unusual, but the situation in this city is unfortunate, unusual. It is very much to be regretted that so many good people of the city have been misled and have been led to believe that a corporation is imposing upon them and infringing upon their rights. It does seem to me, as a citizen whose lot is cast with the city and whose life is to be lived here that the time has come when all of us, whatever our feelings may be, whatever our official relations under it may be, should attempt to divest ourselves of prejudice and of feeling and of regard for personal consequences and undertake to get ourselves and our fellows in this community into a position from which we can see these things clearly and do justice to ourselves and to those whose lot is cast with us.

I will prepare a short memorandum setting forth the court's formal conclusions and file within two or three days. If there is, as the result of that, an order granting the application, the operation of the order will be suspended for two or three days further to permit adjustment of minds, hearts and dispositions, to the end that we may have a peaceful situation when the order is ready for enforcement.

(Adjournment.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 1535.

The United States of America,
vs.
The Toledo Newspaper Company, a Corporation, and Negley D. Cochran,
Defendants.

STIPULATION AS TO CONTENTS OF TRANSCRIPT.

(Filed May 7, 1915.)

It is hereby stipulated between counsel that the following are the portions of the record which shall be incorporated into and constitute the transcript of record to be returned by the clerk on the writ of error allowed March 31st, 1915:

Order for Information,

Information,

Demurrer of defendant, Negley D. Cochran, to Information,

Demurrer of defendant, The Toledo Newspaper Company, to Information,

Order overruling demurrers,

Memorandum opinion of the court overruling demurrers,

Answer of the defendants,

Journal entry finding defendants guilty and fixing penalties,

Memorandum opinion by the court finding defendants guilty,

Motion of The Toledo Newspaper Company for a new trial,

Modification of motion by The Toledo Newspaper Company for a new trial,

Motion of Negley D. Cochran for a new trial,

Motion of The Toledo Newspaper Company for arrest of judgment,

Motion of Negley D. Cochran for arrest of judgment.

Order overruling motions of both defendants for a new trial and for arrest of judgment,

Assignment of errors,

Petition for writ of error,

Order allowing writ of error,
Writ of error,
Citation,
Bond of The Toledo Newspaper Company on writ of error,
Bond of Negley D. Cochran on writ of error,
Order extending time for making return to writ of error,
Order extending time for signing and settling bill of exceptions,
Order settling bill of exceptions,
Bill of exceptions,
Stipulation as to contents of transcript.
Certificate of the clerk.
Order appointing Wm. L. Day as special counsel.

John S. Pratt,
Assistant United States District Attorney.
Lawrence Maxwell,
Jay W. Curts,
Charles S. Northup,
Counsel for Plaintiffs in Error.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 1535.

The United States of America,
vs.
The Toledo Newspaper Company, a Corporation, and Negley D. Cochran,
Defendants.

PRECIPE FOR TRANSCRIPT.
(Filed May 7, 1915.)

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Order for Information,

Information,

Demurrer of defendant, Negley D. Cochran, to Information,

Demurrer of defendant, The Toledo Newspaper Company, to Information,

Order overruling demurrers,

Memorandum opinion of the court overruling demurrers,

Answer of the defendants,

Journal entry finding defendants guilty and fixing penalties,

Memorandum opinion by the court finding defendants guilty,

Motion of The Toledo Newspaper Company for a new trial,

Modification of motion by The Toledo Newspaper Company for a new trial,

Motion of Negley D. Cochran for a new trial,

Motion of The Toledo Newspaper Company for arrest of judgment,

Motion of Negley D. Cochran for arrest of judgment,

Order overruling motions of both defendants for a new trial and for arrest of judgment,

Assignment of errors,

Petition for writ of error,

Order allowing writ of error,

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Citation,
Bond of The Toledo Newspaper Company on writ of error,
Bond of Negley D. Cochran on writ of error,
Order extending time for making return to writ of error,
Order extending time for signing and settling bill of exceptions,
Order settling bill of exceptions,
Bill of exceptions,
Stipulation as to contents of transcript,
Certificate of the Clerk,
Order appointing Wm. L. Day as special counsel,
And deliver all papers to The Toledo Legal Brief & Record Company for printing.

Lawrence Maxwell,
Jay W. Curts,
Charles S. Northup,
Attorneys for Defendants.

Date May 7, 1915.

CLERK'S CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of so much of the record, assignment of errors, papers, exhibits and proceedings in the above entitled cause, as I am advised by counsel—as shown by the attached precipe—are necessary to the hearing in the United States Circuit Court of Appeals, also true and complete copies of the opinions of the court filed therein; and there is annexed to and transmitted therewith, the Citation and Writ of Error issued therein.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court, at Toledo, in said District, this 24 day of May, A. D. 1915, and in the 139th year of the Independence of the United States of America.

B. C. Miller, Clerk.
By J. W. Wilson,
Deputy Clerk.

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Appearance of Counsel.

(Filed May 26, 1915.)

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiffs in Error.

LAWRENCE MAXWELL.
CHARLES S. NORTHRUP.
JAY W. CURTS.

Cause Argued.

(May 8, 1916—Before Warrington, Knappen and Denison, J. J.)

This cause is argued in part by Mr. Lawrence Maxwell for the Plaintiffs in Error and is continued until tomorrow for further argument.

Cause Argued and Submitted.

(May 9, 1916.)

This cause is further argued by Mr. Lawrence Maxwell for the Plaintiffs in Error and by Mr. Wm. L. Day and Mr. E. S. Wertz, United States Attorney for the Defendant in Error and is submitted to the Court.

Judgment.

(Filed Dec. 15, 1916.)

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be and the same is hereby affirmed without costs.

Opinion.

(Filed Dec. 15, 1916.)

Filed Dec. 15, 1916. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2786.

TOLEDO NEWSPAPER COMPANY et al., Plaintiffs in Error,
vs.
UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Northern District of Ohio, Western Division.

Submitted May 9, 1916. Decided December 15, 1916.

Before Warrington, Knappen and Denison, Circuit Judges.

DENISON, *Circuit Judge:*

The chief franchises of the street railway system in the city of Toledo were by their terms to expire on March 27, 1914, and there had been long and bitter controversy between the street railway company and some elements in the city which opposed franchise renewals, unless on conditions which the railway company would not accept. The council passed an ordinance fixing three cents as the rate of fare after March 27th, and an application was made to the court below for a temporary injunction to forbid any attempt to enforce this ordinance. The Toledo Newspaper Company, a corporation, was the publisher of the "Toledo News-Bee," and this paper contained editorial and news articles on the subject. Later, and upon the direction of the judge of the court, an information was filed against the publishing corporation and its managing editor, charging that certain of the publications constituted a contempt. A demurrer to this information was overruled, an answer was filed and upon the issue so joined a trial was had. The respondents were found guilty and were condemned to pay fines,—a nominal one by the editor but a very substantial one by the publishing company (220 Fed. 458). Both respondents join in this writ of error. A more detailed state of facts will be found in connection with the discussion of the questions involved.

1. One matter, more or less mentioned on the argument, should receive notice, although it can not be important to our disposition of the case. At the trial the court was presided over and the findings were made and sentence pronounced by the same judge who was holding the court at the time of the publications complained of. His legal right to conduct the trial is not questioned; indeed, it is

obvious that, in the typical case of direct contempt, to require a substitution of judges before the contempt could be punished would be to deprive the proceeding of its summary character and destroy its efficiency as a means of securing the unimpeded administration of the law. However, there are frequent cases where, even though mistakenly, a general belief may easily arise that there is a personal controversy between the contemnor and the judge of the court. Even in cases of this class, if the necessity for summary action or if other reasons make impracticable the substitution of another judge to hear the contempt matter, the duty of the regular judge of the court to proceed with it is clear, no matter how embarrassing this duty may be to him; in these cases, if there is no immediate urgency and if no other reason exists making it specially appropriate that the same judge act, we think it by far the better policy to call in another judge; and the federal system provides special facility for so doing. We can well understand the reluctance with which a district judge would put himself in a position which seemed to be a shifting to another of this sometimes very burdensome and very delicate duty; but it is of the greatest importance that contempt proceedings be put, as far as possibe, beyond the reach of even unjust adverse criticism, and, in such a situation as has been recited, the judges of this court upon whom the duty may fall will always be ready to assign a judge from another district.

2. This is an error proceeding, in a case at law. No specific findings of fact were requested or made. General and ultimate findings were embodied in the order. Under these conditions it is not necessary that every fact necessary to support the judgment should be particularly found. Even if we do not here apply the strictness of the rule that every fact necessary to support the judgment will be assumed so far as not contradicted by the record, we may at least assume those things which are naturally to be inferred and which the opinion and the course of the proceedings below indicate every one took for granted.

3. It is undisputed that the newspaper publications had reference to the general subject-matter, some phases of which were then pending in the district court, and had reference to the making and the effect of the injunctional order, the application for which was then pending. It is suggested, if not very directly urged, upon the oral argument, that the court had no jurisdiction whatever in the pending cause to make such an injunctional order as asked, or any order to that effect, and that, therefore, there could be no contempt with regard to such subject-matter. This question is not distinctly covered by any assignment of error nor is it mentioned in the very careful brief prepared by respondent's counsel; but it pertains to the jurisdiction and should be noticed even upon our own motion. It requires further details to be stated.

On January 26, 1914, judgment creditors, citizens of New York, filed in the court below a bill in the nature of a creditors' bill against the railway, citizen of Ohio, setting out, among other things, that the three cent ordinance was confiscatory, and that compliance

therewith would destroy the equity of redemption from existing mortgages, to which equity alone judgment creditors could resort, and that there had been in effect an extension of the franchises until October. It prayed a receivership, and that if the judgment was not satisfied before the date set for going into effect of the ordinance, the city of Toledo then be made a party defendant, and that it then be enjoined from enforcing the ordinance. A motion for the appointment of a receiver was entered, but not brought on for hearing. March 24th, on petition that day filed, an order was entered permitting plaintiffs to make the city a defendant, and an amended bill was filed accordingly. On the same day the railway company filed its cross-bill against the city asking the same relief; and motions for preliminary injunction were duly entered. These motions were brought to the attention of the court on March 26th. The court did not that day hear the motions formally, but indicated that until there was time for decision, matters ought to remain in statu quo. On March 30th, and after formal hearing on the 28th, an opinion was filed holding that the ordinance was not self-executing; that it provided for its execution by the filing of a bill and the obtaining of a court order to put it in force; that all questions involved could be raised in defending such application; that plaintiffs had, in this way, an adequate remedy without themselves moving affirmatively in a court of equity; and, hence, that the court could not grant the injunction asked. No order denying the motions seems to have been entered. Later, the motions were renewed and arguments and hearings before the court were had from time to time in August and September. On September 12th, the court filed an opinion holding that the situation had changed in that the city officials were interpreting the ordinance as self-executing and were attempting to enforce it without any court proceeding, and that, since it was practically conceded that the three cent rate was confiscatory, plaintiffs were entitled to a temporary injunction.

There was ample jurisdiction to justify punishing any contempt committed at this stage of the case. Even if it might be said that the court is not entitled to full protection as a court while it is considering and deciding, either way, the question whether it has power to give the relief sought. (U. S. v. Shipp, 203 U. S. 563; Fair v. Kohler, 228 U. S. 22); and even if it might be denied that the real dispute here was whether use of the streets by the company would be an acceptance of the ordinance notwithstanding the declared purpose not to accept, and might be denied that this dispute presented a justiciable controversy giving power to made an order fixing the terms of use temporarily yet it can not be doubted that the bill as filed presented also a claim that the old franchise would not expire until October, and so asserted a good case for the relief asked. The judge on March 30 announced his opinion that this claim was not good in law, and part of the publications complained of were of a later date; but this question abided in the case, in spite of his provisional decision. On the final hearing or on appeal it might turn out that plaintiff was right; and a court may temporarily

preserve the status quo, even after deciding to dismiss the cause (Cutting v. Kansas City, 183 U. S. 79, 80). The jurisdiction to make a provident order in the subject-matter is clear; and it would not be material to the preliminary jurisdiction if it should be thought that an order actually made was improvident.

The publications complained of were made during the periods from March 24th to March 30th, and from August 14th to September 11th, during the pendency, respectively, of the first and second motions.

4. The question of jurisdiction past, the next inquiry is whether the publications constituted that "misconduct," to the punishment of which the power of the court is limited by the statute (Judicial Code, Section 268). It is clear, from the very words of the statute, that "misconduct" carries a double limitation. Not everything which may rightly be classified under this general name is punishable; to be so, it must have the required character and the required location. First, as to character. It must "obstruct the administration of justice." Although this limitation is expressed only as to that class of contempts not committed in the physical presence of the court, it must be implied in the other class as well; for the typical case of misconduct in a court room inherently "obstructs the administration of justice," and in these five words are epitomized the reasons why power to punish for contempt must exist. If we give our attention alone to this matter of the character of the misconduct, omitting for the present any thought as to its location, we see that we may,—so far as the decision of this case is concerned,—disregard all cases of mere libel and slander against the judge of the court and all cases of newspaper or other comment directed against past judicial action. In both of these classes, such tendency as there is to obstruct the administration of justice is not of the direct nature which we have here to consider. Whether there may be cases which seem only to refer to the past action of the court or which seem to be substantially slander or libel, and which, nevertheless, should be treated as an obstruction within the meaning of this statute, is a matter about which we have no occasion to express an opinion. Upon this record, the publications had reference to pending judicial action, and there is a finding of fact ("as alleged in the information") that they tended and were intended to provoke public resistance to an injunctional order, if one should be made, and there is a finding that they constituted an attempt to intimidate,—at least unduly to influence,—the district judge with reference to his decision in the matter pending before him. That each of these findings is supported by competent evidence and for that reason binding upon this court is too clear for dispute; but we may rightly go further and say that it is difficult to see how any other findings could have been made. The publications are set out in some detail in the opinion of the district judge (pp. 460-472, 220 Fed.). They must be considered collectively, not singly; they must be taken, headlines as well as text, as intended to produce the effect which all must know they would be likely to produce upon many

of the great audience to which they were addressed United States v. Thatcher (C. C. A. 6), 212 Fed. 801, 810; they were, in form and substance, well adapted to bring about resistance to and utter public disregard of an injunctional order, and to influence a weak judge into denying the order through fear of those weapons of public abuse and ridicule which respondents controlled and showed their willingness to use. Manifestly, it is of no importance that, when the order was finally made, and its operation had been postponed a short time expressly to give opportunity for excitement to die out, no riotous disobedience followed; and it is equally of no importance that in such a case the attempt may produce in the judge's mind irritation instead of fear.

5. This leaves for consideration only the second statutory limitation,—that pertaining to the place where the misconduct occurs. The elaborate printed brief for plaintiffs in error is devoted wholly to this question, and it is argued, in effect, that a newspaper publication, no matter what its character and no matter whether with reference to a matter pending, is wholly immune from punishment as for contempt, provided it is not circulated in the court room while the court is in session.

It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the court house corridors, on the steps or in the immediate vicinity of the court house. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that, in a city like Toledo, and with a court house situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the court house windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts can not, in any event, be fatal; but without intending to decide whether these facts may be necessary.

Considering only the face of the statute, we see no reason to think that a newspaper publication, circulating in enormous numbers in the very community where the court is sitting, and where its order, if made, is to be executed, and reaching and appealing to the very persons who are to be affected by the order, and surely tending to prevent an impartial and free decision by judge or jury, may not rightly be deemed "so near thereto" as to constitute an obstruction to the due administration of justice. The very statement of the situation seems to show that such a publication, if it is of the character to be called "misconduct," is within the class which may be punished. Indeed, the only substantial argument to the contrary is that the history of the statute shows an intent by Congress to make all newspaper publications immune, and, hence, that the language of the statute should be construed, even at the cost of some violence

to its letter, so as to carry out this congressional intent. The history of the statute and the various decisions, state or federal, which have considered and construed this or similar laws, are most thoroughly considered by the district judge in his opinion. (See pp. 474-491, 220 Fed.) We are not called upon to sanction every characterization or every subordinate conclusion found in this discussion,—we may or may not do so,—but we approve its general course and its result and its analysis of the opinions cited. We can add only one thing. The Pennsylvania statute, which is said to have been so far the basis and model of the federal statute that the latter should be treated as for the same purpose and having the same effect as the former, not only gave immunity to all misconduct not in the presence of the court and omitted the modifying "or so near thereto," but also contained a section expressly prohibiting any contempt proceedings based on any newspaper publication.[1] The Pennsylvania legislature, apparently realizing that a newspaper publication, on account of its very broad operation, might perhaps be considered as being "in the presence of the court," thereupon added an express provision on the specific subject, and by that express provision, Section 2, granted that further immunity which the legislature thought the public policy of the state required. If it be true, as claimed, that the Pennsylvania statute was the model which Congress had before it, and if it be true that the federal statute should be construed on the theory that the protection of a newspaper from oppressive contempt proceedings, as exemplified in the matter of Judge Peck, was the real subject-matter present in the congressional mind, we find, first, that the evil under consideration and the exemption which the Peck proceedings suggested, pertained, not to interference in pending cases, but to comments on past decisions; we find, second, that in the language intended to exclude from immunity Congress inserted a limitation,—"or so near thereto, etc",—well adapted to reach, and so exclude from immunity, many cases of newspaper publication; we find, third, that Congress refused to adopt, from the model before it, that provision which sought expressly to reach and protect a newspaper. From this history of the statute, we can not understand how a general intent to make all newspaper publications immune can be inferred; the ordinary canons of construction lead to the contrary inference[2]

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[1] Section 2, Act of April 3, 1809: "All publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in or concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same."

[2] Decisions, since the opinion below, and tending to support the same conclusions are: In re Independent Pub. Co. (Borquin, D. J.), 228 Fed. 787; State v. Nelson (N. D.), 150 N. W. 267; Tate v. State (Tenn.), 177 S. W. 69.

What has been so far said pertains to the first count of the information. The sentences imposed are amply supported by conviction under the first count, and whether the record shows any error as to the second and third counts becomes immaterial (Claassen v. United States, 142 U. S. 140, 146; Hardesty v. United States, C. C. A. 6, 168 Fed. 25, 26). We the more readily apply this rule and refrain from detailed consideration of these counts, because it is clear enough that they pertain merely to matters in aggravation of the unitary course of conduct covered by the first count.

The judgment and the sentences imposed are affirmed; but since costs are not awarded either for or against the United States, the affirmance will be without costs.

Petition for Writ of Error.

(Filed Jan. 10, 1917.)

The plaintiffs in error, The Toledo Newspaper Company, a corporation, and Negley D. Cochran, pray a writ of error from the Supreme Court of the United States to review the judgment herein entered December 15, 1916, to operate as a supersedeas, and file herewith their assignments of error; upon consideration whereof said plaintiffs in error pray that said judgment be reversed and set aside.

THE TOLEDO NEWSPAPER COMPANY,
NEGLEY D. COCHRAN,
By LAWRENCE MAXWELL,
J. W. CURTS,
Their Attorneys.

Allowed Jany. 10, 1917. Bond fixed at two thousand dollars, to operate as supersedeas.

ARTHUR C. DENISON,
U. S. Circuit Judge.

Assignment of Errors.

(Filed Jan. 10, 1917.)

The United States Circuit Court of Appeals erred;

1. In construing Section 268 of the Judicial Code and refusing to hold that the District Court was without jurisdiction because no contempt was alleged or proved under the provisions and limitations of said section.

2. In holding that facts which were not alleged in the Information might be presumed in support of the judgment.

3. In holding that facts which were not proved by evidence might be presumed in support of the judgment.

4. In refusing to reverse the judgment of the District Court on the ground that there was no allegation in the Information, no evidence, and no finding that the publications complained of were

read by the Judge of the District Court or brought into court or sold or distributed in the court.

5. In holding that it was immaterial whether the record showed error as to the second and third counts.

6. In affirming the judgment of the District Court which plaintiffs in error submit should have been reversed for errors of the District Court duly assigned in the Court of Appeals, towit:

(*a*) In overruling the demurrers to the Information and the demurrers to each count thereof.

(*b*) In overruling the motions made at the close of the evidence to dismiss the first count of the Information and the several specifications thereof.

(*c*) In overruling the motions made at the close of the evidence to dismiss the second count of the Information and each specification thereof.

(*d*) In overruling the motions made at the close of the evidence to dismiss the third count of the Information.

(*e*) In overruling the motions to arrest judgment on the first count of the Information.

(*f*) In overruling the motions to arrest judgment on the second count of the Information.

(*g*) In overruling the motions to arrest judgment on the third count of the Information.

(*h*) In overruling the motions to set aside the findings and judgment and to discharge defendants or to grant a new trial.

LAWRENCE MAXWELL,
J. W. CURTS,
Attorneys for Plaintiffs in Error.

Bond on Writ of Error.

(Filed Jan. 10, 1917.)

Know all men by these presents, That we, The Toledo Newspaper Company and Negley D. Cochran, as principals, and United States Fidelity and Guaranty Company of Baltimore, Md., as surety are held and firmly bound unto The United States of America in the full and just sum of two thousand dollars, to be paid to the said The United States of America their certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of January, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said Court between said The Toledo Newspaper Company and Negley D. Cochran, Plaintiffs in Error and the United States of America, Defendant in Error, a judgment was rendered against the said Plaintiffs in Error and the said Plaintiffs in Error having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse

the judgment in the aforesaid suit, and a citation directed to the said United States of America, Defendant in Error citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Toledo Newspaper Company and Negley D. Cochran shall prosecute the writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TOLEDO NEWSPAPER COMPANY, [SEAL.]
By LAWRENCE MAXWELL, *Attorney.*
NEGLEY D. COCHRAN, [SEAL.]
By LAWRENCE MAXWELL, *Attorney.*
UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By EDWARD E. SHIPLEY,
Attorney in Fact.

Sealed and delivered in the presence of—
ARTHUR B. MUSSMAN.

Approved by—
ARTHUR C. DENISON,
U. S. Circuit Judge.

Jan'y 10, 1917.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Toledo Newspaper Company, a corporation, and Negley D. Cochran, Plaintiffs in error, and The United States of America, Defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, The Toledo Newspaper Company and Negley D. Cochran, and each of them as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to

correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Allowed by—
ARTHUR C. DENISON,
Judge of the United States Circuit Court of Appeals for the Sixth Circuit.

Filed Jan. 10, 1917. Wm. C. Cochran, Clerk.

(Return on Writ of Error.)

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of error, I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do herewith transmit, under the seal of said court, a true, full and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, to the Supreme Court of the United States, together with said writ of error.

Witness my official signature and the seal of said Court, at Cincinnati, Ohio, in said Circuit this — day of January, A. D. 1917 and in the 141st year of the Independence of the United States of America.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of The Toledo Newspaper Co., et al., vs. United States of America, No. 2786, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof together with the original writ of error.

In Testimony Whereof, I have hereunto subscribed my name, and

affixed the seal of said Court, at the City of Cincinnati, Ohio, 16th day of January, A. D. 1917.

[Seal United States Circuit Court of Appeals, Sixth Circuit

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circu

UNITED STATES OF AMERICA, ss:

To United States of America, Greeting:

You are hereby cited and admonished to be and appear Supreme Court of the United States, at Washington, within 30 from the date hereof, pursuant to a writ of error, filed in the Cl Office of the United States Circuit Court of Appeals for the S Circuit wherein The Toledo Newspaper Company and Negley Cochran are plaintiffs in error and you are defendant in erro show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, sh not be corrected, and why speedy justice should not be done to parties in that behalf.

Witness, the Honorable Arthur C. Denison, United States Ci Judge, Sixth Circuit, this tenth day of January, in the year of Lord one thousand nine hundred and seventeen.

ARTHUR C. DENISON,
United States Circuit Judge, Sixth Circu

Service accepted January 19, 1917.

JOHN W. DAVIS,
Solicitor Genera

H.

Endorsed on cover: File No. 25,710. U. S. Circuit Court App 6th Circuit. Term No. 880. The Toledo Newspaper Company Negley D. Cochran, plaintiffs in error, vs. The United State America. Filed January 18th, 1917. File No. 25,710.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 880.

THE TOLEDO NEWSPAPER COMPANY AND NEGLEY D. COCHRAN, PLAINTIFFS IN ERROR.

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND GROUNDS IN SUPPORT THEREOF.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Toledo Newspaper Company, a corporation, and Negley D. Cochran, pray a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit in case No. 2786 on the docket of that court, in which your petitioners were plaintiffs in error, and respondent, the United States of America, was defendant in error, and in which the judgment of the court of appeals

against petitioners affirming the judgment of the district court was rendered December 15, 1916. A writ of error from this court to review the judgment of the court of appeals was duly allowed by Circuit Judge Denison and filed January 18, 1917, and copies of the record printed under supervision of the clerk are on file in the clerk's office. The writ of error was allowed under section 241 of the Judicial Code, giving right to an appeal or writ of error to this court, in cases in which the jurisdiction of the circuit court of appeals is not made final. This petition for a writ of certiorari is filed within the time limited by law for applying for such writ, as a precaution in case it should be held that the writ of error does not lie.

Statement of the Case.

On October 28, 1914, U. G. Denman, attorney of the United States for the Northern District of Ohio, filed in the district court an information (R., 3) against petitioners, pursuant to an order (R., 2), entered by District Judge John D. Killits, wherein it was stated that certain publications in the Toledo News-Bee, a newspaper published and edited by petitioners, respectively, seemed to involve petitioners "in contempt of the authority of this court, as misbehavior on the part of said corporation and said editor, and both, so near to the presence of this court as to obstruct the administration of justice." The information charged that in respect to a suit in equity pending on the docket of said district court, entitled, Doherty et al. vs. The Toledo Railways & Light Company, your petitioners had on stated dates caused to be published in said newspaper certain articles, editorials and cartoons tending and intended to embarrass the court and obstruct the administration of justice with reference to said suit. The cause was tried by Judge Killits on the information and answer of petitioners and evidence, petitioners found guilty and assessed fines as against The Toledo Newspaper

Company of $7,500.00 and costs, and as against Negley D. Cochran of $200.00, with an order of commitment to jail until payment (R., 105), which judgment the court of appeals affirmed. The decision of the district court is reported in 220 Fed., 458. The decision of the court of appeals is reported in 237 Fed., 986.

Grounds for the Petition.

By the Act of Congress of March 2, 1831 (4 Stat., 487; R. S., Sec. 725), which was retained without substantial change in the Act of March 3, 1911, known as the Judicial Code, and being section 268 thereof, it is provided:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; Provided, that such power to punish contempt shall not be construed to extend to any cases except of misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The information does not allege that any of the publications complained of were brought into the court-room or court building by petitioners or any one else or that the district judge read any of them; nor is there any finding of fact to that effect (Findings of Fact, R., 105 et seq.), nor any evidence which could have been the basis of such finding. The only allegation on the subject in the information is that the newspaper "for more than five years prior to and up to and including September 17, 1914, was published, sold and widely circulated within the city of Toledo and vicinity, which was the residence of the district judge."

The construction of the statute adopted by the district court is shown by the following syllabus (No. 5, R., 110) prepared by the judge as part of his opinion:

> "In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers."

The court of appeals approved this construction of the statute and affirmed the conviction on the additional ground that even though the record did not show that "the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the court-house corridors, on the steps, or in the immediate vicinity of the court-house," (Opinion, p. 6), that if such facts were essential under the statute they might be presumed in support of the judgment.

The act of 1831 was passed as the result of the acquittal by Congress on impeachment proceeding of United States District Judge Peck, who in 1825 issued an attachment in contempt against Lawless, an attorney, imprisoned and disbarred him for printing in a newspaper a criticism of a decision of Judge Peck. At the time of its passage, and for many years thereafter, the purpose and effect of the act were understood and accepted by judges who were familiar with the controversies that occasioned its enactment, and its plain provisions were enforced. Recently, a tendency has been exhibited, culminating in the judgment of the district court, by judges sitting in cases in which they are in effect the prosecuting parties, to construe away the clear and explicit language of the act, and to assume jurisdiction contrary to its express provisions.

This court has never had occasion to construe the statute in respect to newspaper publications, or to decide whether articles published in newspapers concerning pending cases,

which are not circulated in court or brought to the attention of the judge or jury, constitute misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice," within the meaning of the statute. But the statute has been under consideration, and opinions as to its purpose and effect, directly at variance with the decisions below, have been expressed here, and in the lower Federal courts.

In *Ex parte* Poulson, Fed. Cas. 11350 (Circuit Court for the Eastern District of Pennsylvania, 1835), on an application for an attachment in contempt against the editor of a newspaper, Mr. Justice Baldwin said:

> "The law prohibits the issuing of an attachment, except in certain cases, of which the present is not one. It would therefore be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the act of 1831 would show most conclusive cause. The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published upon either without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most wilful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out-of-door influence practiced with impunity."

In United States *vs.* Holmes, Fed. Cas. 15853 (1842), he expressed the same view, saying:

> "By an act of Congress, passed some years since, the court has no longer the power to punish, as for contempt, the publication of testimony pending a trial before us."

In *Ex parte* Bradley, 7 Wall., 364 (1868), Mr. Justice Nelson referred to the statute as one which "in express terms restricts the power (to punish for contempt), except for 'mis-

behavior in the presence of said courts, or so near thereto as to obstruct the administration of justice.' "

In 1872 Mr. Justice Curtis, in his lectures at the Harvard Law School, said that the common-law authority of the courts to punish summarily for contempt "is now restricted either to the action of the court upon its own officers, to prevent them from committing a breach of official duty, or to contempts, as they are called, in the presence of the court, or *so near to the court as to disturb its proceedings*, or to some misconduct of a juror or other person who disobeys an order of the court" (Curtis, on Jurisdiction of United States Courts [2d ed.], 176).

In *Ex parte* Robinson, 19 Wall., 505 (1873), Mr. Justice Field said, respecting the authority of the lower Federal courts:

> "The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: First, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the courts in his official transactions, and, third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order and decorum in their presence*, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

In *In re* May, 1 Fed., 737 (1880), Judge, afterwards Mr. Justice Brown, said:

> "The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

In *Ex parte* Schulenburg, 25 Fed., 211 (1885), the same judge said:

> "The difficulty in this case, however, arises from the statutes of the United States, one of which (Sec. 720) inhibits injunctions to stay proceedings in any court of a State except in bankruptcy cases, and the other of which (Sec. 725) limits our jurisdiction in cases of contempt to misbehaviors of any person in the presence of the court, or so near thereto as to obstruct the administration of justice, etc. * * * Conceding that the service of the writ of garnishment was a contempt at common law, I doubt seriously whether it is a misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice. Clearly it falls within no other clause of sec. 725. *These words seem to me to refer rather to riotous or unseemly conduct in the court room, or in such immediate proximity thereto as to interrupt the sessions of the court or the orderly conduct of business therein, and not to embrace constructive contempts of its authority.*"

Savin, Petitioner, 131 U. S., 267, and Cuddy, Petitioner, 131 U. S., 280 (1889), in which Mr. Justice Harlan delivered the opinions, discuss the construction of the act of 1831, but not, however, in reference to newspaper publications.

There is a clear statement of the purpose of the act in *Ex parte* McLeod, 120 Fed., 130 (1903), where District Judge Jones said:

> "Congress intended by this statute to put an end to the power of any Federal court to prevent, by punishment as for contempt, criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice."

In Cuyler *vs.* Atlantic & N. C. R. Co. (*In re* Josephus Daniels), 131 Fed., 95 (1904, C. C. A.), the whole subject was discussed by Circuit Judge Pritchard, in holding that certain editorials by Mr. Daniels, criticizing the appoint-

ment of a receiver for the railroad by the Federal court, did not subject him to summary punishment for contempt under the statute. In the course of the opinion, Judge Pritchard quotes from a note to page 340 of volume 1 of Kent's Commentaries as follows:

> "That act (1831) had withdrawn from the courts of the United States the common-law power to protect their suitors, officers, witnesses and themselves against the libels of the press, however atrocious, and though published and circulated pending the very trial of the cause."

Patterson *vs.* Colorado, 205 U. S., 454, was a writ of error to the Supreme Court of Colorado, to review its judgment of contempt against plaintiff in error for publishing certain articles which reflected upon the conduct of the Supreme Court of Colorado in cases pending before it, on the ground that rights of plaintiff in error under the Fourteenth Amendment had been infringed. This court held that there was no ground for the claim, and dismissed the writ for want of jurisdiction. Nothing was decided except that the case did not involve a Federal question.

In order to determine the proper construction of the act of Congress as applied to the case, the contempt proceeding cannot be disassociated from, but must be considered in connection with the case of Doherty *et al. vs.* The Toledo Railways & Light Co., concerning which the contempt was charged to have been committed.

For many years prior to the institution of that suit controversy and discussion had prevailed in regard to the street-car situation in the city of Toledo, especially with respect to the question as to what constituted a proper fare. Two well-known mayors of the city, Samuel Jones, known as "Golden Rule Jones," and Brand Whitlock, had been leaders in stimulating interest in the street-railway problem and municipal affairs generally, and at the municipal election of 1913 each political party pledged its candidates to three-cent fares

(R., 92). On March 27, 1914, the franchises under which The Toledo Railways & Light Company, or Doherty and partners, or both, were occupying the streets expired (Information, R., 4), and on March 28 an ordinance, known as the Schreiber Ordinance, theretofore enacted by the city council, was by its terms to become effective. That ordinance provided that only upon the terms and conditions contained therein (which included a provision for three-cent fares) consent and authority was given the street railway company to operate its cars "on the streets and portions of streets whereon franchises expire on said March 27, 1914" (R., 89).

Prior to the going into effect of the ordinance, Doherty *et al.* filed their suit in the district court against the Railways and Light Company; it was a creditors' bill, based on a judgment recovered by plaintiffs against defendant and an execution returned unsatisfied. The answer of petitioners filed in the contempt proceedings alleged that the suit was a collusive one, brought without any intent to enforce a judgment against the railway company, but only for the purpose of bringing the city of Toledo into the Federal court to secure the suspension of the operation of the Schreiber ordinance, on the pretense that a Federal question was involved.

There was no real controversy between plaintiff and defendant in that suit, and no justiciable question as between the parties, whose interests were in fact the same, and the city of Toledo. The city, by the Schreiber ordinance, had simply prescribed the terms upon which the street railroad company might occupy the streets, if it chose to occupy them at all, after the expiration of its franchises. That no Federal question was involved in the case is settled by the decision in Detroit United Railway *vs.* City of Detroit, 229 U. S., 39, in which the third syllabus is:

> "Where a street railroad company is operating in the streets of the city for a definite period and has enjoyed the full term granted, the municipality may,

upon failure of a renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the Federal Constitution or depriving the company of its property without due process of law."

The institution of the Doherty suit did not initiate public interest or public discussion in regard to the street-car situation; that interest and discussion had existed long prior to the suit. The articles published by petitioners respecting the suit were not such as could influence a decision one way or the other between antagonistic parties seeking *bona fide* an adjudication of rights; there were no such parties or rights, opposed or in issue. The decisions of the lower courts permit the colluding parties to effectively suspend the right of public discussion as long as they can keep the suit pending. It may be that the district court was not so absolutely without jurisdiction, that an active interference with its proceedings would not be punishable by summary process. That is not the question in this case. The question is whether the continuation, by a newspaper, of a discussion long since initiated, automatically becomes, by the institution of a suit concerning the subject-matter, misbehavior so near the court "as to obstruct the administration of justice," when the publications continue to be addressed to the former readers, and are not brought into court or read by the judge before whom the case is pending.

We suggest that consideration of this application be postponed until the decision on the writ of error in regular course, and submit that in case the writ of error be held not to lie, that the case is a proper one for award of the writ of certiorari.

LAWRENCE MAXWELL,
CHARLES S. NORTHUP,
JAY W. CURTS,
JOSEPH S. GRAYDON,
Counsel for Petitioners.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE TOLEDO NEWSPAPER COMPANY AND Negley D. Cochran, Plaintiffs in Error, *v.* THE UNITED STATES OF AMERICA. } No. 371.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Plaintiffs in error were cited for contempt by the District Court of the United States for the Northern District of Ohio, Western Division, on an information filed by the United States Attorney for that district and division charging them with having published certain alleged contemptuous newspaper articles with reference to certain cases pending in the said District Court, in violation of section 268 of the Judicial Code which provides *inter alia* that the United States courts shall have power to punish contempts of their authority—

> *Provided*, That such power to punish contempts shall not be construed to extend to

> any cases except the misbehavior of any person in their presence, *or so near thereto as to obstruct the administration of justice.* . . .

Demurrers to the information on the ground, among others, that the acts charged in the information in connection with said newspaper publications did not constitute misbehavior in the presence of the court *or so near thereto as to obstruct the administration of justice* were overruled. Answer was filed, trial proceeded with, and plaintiffs in error found guilty of contempt, the district court holding, among other things, that under section 268 the publication of newspaper articles of embarrassing nature to a judge of the Federal courts in his consideration of a pending case, or which tend to appeal to prejudice against the court or against a party to a pending cause, is misbehavior so near the presence of the court as to obstruct the administration of justice. A fine of $7,500 was imposed on the Toledo Newspaper Company and of $200 on Cochran (220 Fed. 458, 515).

A writ of error from the Circuit Court of Appeals for the Sixth Circuit was allowed and the judgment of the district court affirmed (237 Fed. 986, 993). The Circuit Court of Appeals allowed a writ of error from this court and at or about the same time and on March 12, 1917, plaintiffs in error filed in this court a petition for a writ of certiorari to the judgment of the Circuit Court of Appeals, consideration of which petition was on March 19, 1917, postponed to the hearing on the merits.

The case is of utmost importance to the Federal courts in determining what may be misbehavior so near to them as to obstruct the administration of justice and constitute contempt of their authority under section 268, and for that reason an early determination by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1917.

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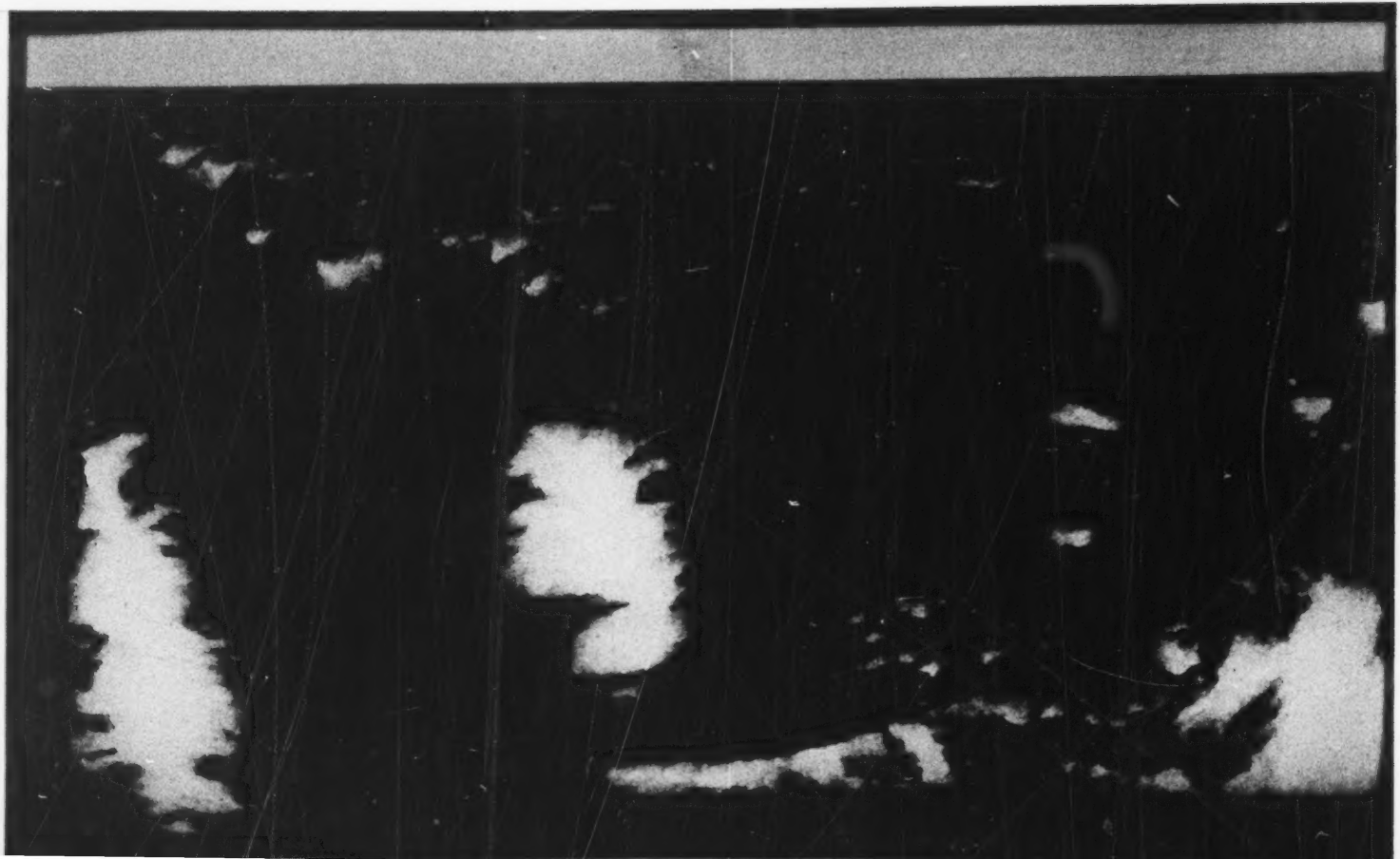

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Supreme Court of the United States,

OCTOBER TERM, 1917

No. 371

The Toledo Newspaper Company and Negley D. Cochran, Plaintiffs in Error,

vs.

The United States of America.

Error to the United States Circuit Court of Appeals for the Sixth Circuit, and Petition for Writ of Certiorari.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

On October 28, 1914, U. G. Denman, attorney of the United States for the Northern District of Ohio filed in the District Court at Toledo, an Information (R. 3) against plaintiffs in error pursuant to an order (R. 2) entered by District Judge John M. Killits, wherein it was stated that certain publications in the Toledo News Bee, a newspaper published and edited respectively by plaintiffs in error, seemed to involve plaintiffs in error "in contempt of the authority of this court, as misbe-

havior on the part of said corporation and said editor, and both, so near to the presence of this court as to obstruct the administration of justice."

The Information charged that since the Spring of the year 1913 a partnership known as Henry L. Doherty & Company had been operating the properties of the Toledo Railways & Light Company in the city of Toledo, under a contract with that company; that with the close of March 27, 1914, practically all the franchises owned by said company on the streets of Toledo expired, "since which time continuously said street car company and said partnership have operated said street car system without franchises on said streets;" that in November, 1913, the council of the city passed an ordinance known as the Schreiber ordinance, to go into effect March 28, 1914, on said expiration of franchises of the street car company, by the terms of which said company and partnership were required to convey passengers over said system for a fare not to exceed three cents, etc., and "that said street car company and said partnership managing the same as aforesaid, promptly notified said city that they could not accept the terms of said Schreiber ordinance, and would not operate their cars on the streets of said city thereunder." The Information showed further that said partnership of Doherty & Company filed a suit in the court on January 16, 1914, against the Toledo Railways & Light Company, which "immediately became and from then continuously until after the 17th day of September, 1914, remained a pending action in this court,"

in which suit plaintiffs had requested leave of court to make the city of Toledo a party defendant, which leave was granted on March 24, 1914; that thereupon plaintiffs asked for an order of injunction against the enforcement of said Schreiber ordinance on and after March 28, 1914, on the ground that the same was confiscatory, unreasonable and invalid. It was then alleged that while said suit was pending, on March 24, 1914, and on stated dates thereafter, defendants caused to be published in said newspaper certain news articles, editorials and cartoons in respect to said suit, the same being reproduced in full in the Information.

The first count of the Information charged that said publications separately and in their aggregate effect tended and were intended to embarrass the court, and to obstruct the administration of justice by the court with reference to said suit,

> "through an impression to be conveyed to said judge thereof having the duties of said court to perform that any order it might make favorable either to said partnership, or to the said street car company, would meet with great public disfavor, and in that they tended to hinder said judge of said court in the exercise of a clear and impartial judgment in said cause, and in that the publications impugning the motives of said judge of said court, tended to interfere with the administration of the law by said judge of said court; and further in that they tended and were intended to provoke among the citizens of the city of Toledo, with reference to said pending

cause, an open resistance to any order which said court might make therein not approved by said defendants; and further tended and was intended to bring to the mind of said judge of this court performing the duties of said court, with reference to said suit, an impression and feeling that any order in said cause issued upon said motions, not approved by said defendants, might be met by the open resistance of a large number of the people of the city of Toledo." (R. 71).

The second count (R. 72) embodies by reference the allegations of the first count concerning the commencement and pendency of the equity suit of Doherty, et al vs. The Toledo Railways & Light Company, and avers that in said suit Judge Killits (R. 73) on September 11, 1914, entered an order and issued an attachment in contempt for one John Quinlivan on the charge of uttering criticisms against the court at a meeting of delegates of various labor unions held in the city of Toledo on September 10, 1914; and that on September 12 and 14, 1914, while said proceedings in contempt against Quinlivan were pending, plaintiffs in error published certain articles in reference thereto, which it is charged constituted misbehavior so near the presence of the court as to obstruct the administration of justice with reference to said contempt proceedings, in several respects stated in the Information.

The third count of the Information (R. 76) charges that on September 15, 1914, Judge Killits issued an attachment in contempt against one Harry J. Howard, an

editor of the Toledo News Bee, based upon the publications in said newspaper concerning the proceedings in contempt against Quinlivan, and that on September 17, 1914, in reference to the contempt proceedings against Howard, defendants published a certain editorial which, it was alleged (R. 79), "tended and by said defendants was intended to belittle and ridicule said court and said judge," and "constituted misbehavior on the part of said defendants so near the presence of said court as to obstruct the administration of justice with reference to said proceedings in contempt against said Howard, etc."

Defendants demurred severally and separately to the Information and each count on the ground that the acts of defendants alleged did not constitute contempt and that the court was without jurisdiction to punish defendants (R. 80, 81), which demurrers were overruled December 4, 1914 (R. 82).

Defendants filed a joint answer (R. 89) in which they set forth briefly the history of the controversy between the street railway interests and the city, under the mayoralties of "Golden Rule Jones" and Brand Whitlock, and showed that it had been a matter of public discussion and political agitation for ten years prior to the passing of the Schreiber Ordinance of November 24, 1913. The answer averred that in respect to this controversy the Toledo News Bee had been a newspaper independent of politics, supporting non-partisan municipal government, lower street car fares, and municipal ownership of public utilities. The answer also recited

the substance of the pleadings and proceedings in the Doherty case for the purpose of showing that it was a collusive suit, both sides being controlled by the same parties, brought without any intent to collect a judgment against the Railway Company, but only for the purpose of bringing the city of Toledo into the Federal Court to secure the suspension of the operation of the Schreiber Ordinance, on the pretense that a Federal question was involved.

In answering the counts of the Information separately, defendants admit the publication of the articles, but deny the innuendoes and inferences sought to be drawn therefrom, or that said publications constituted misbehavior or contempt in any of the respects stated in the Information.*

The case was tried before Judge Killits, December 28, 1914 (R. 196), and on January 23, 1915 (R. 105), he found plaintiffs in error guilty and assessed a fine against the Toledo Newspaper Company of $7,500.00 and costs, and against Negley D. Cochran of $200.00, with an order of commitment to jail until payment. In an opinion filed the same day (R. 109-180) Judge Killits states the reasons for his conclusions.

Motions for a new trial and in arrest of judgment were filed and overruled (R. 181 et seq.) and a writ of error from the Circuit Court of Appeals was allowed (R. 191) on assignments of error, filed March 31, 1915 (R. 186).

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* Each paragraph of the answer bears the same number as the specification of the Information to which it is an answer.

The Circuit Court of Appeals affirmed the judgment and sentences of the District Court (R. 420). Circuit Judge Denison, who delivered the opinion, allowed the writ of error from this court (R. 420).

The opinion of the District Court is reported in 220 Fed. 458, that of the Court of Appeals in 237 Fed. 986.

Specification of Errors.

The assignment of errors filed in the Court of Appeals, all of which are relied on, are found at p. 420 of the record. They are that the court erred;

1. In construing Section 268 of the Judicial Code and refusing to hold that the District Court was without jurisdiction because no contempt was alleged or proved under the provisions and limitations of said section.

2. In holding that facts which were not alleged in the Information might be presumed in support of the judgment.

3. In holding that facts which were not proved by evidence might be presumed in support of the judgment.

4. In refusing to reverse the judgment of the District Court on the ground that there was no allegation in the Information, no evidence, and no finding that the publications complained of were read by the Judge of the District Court or brought into court or sold or distributed in the court.

5. In holding that it was immaterial whether the record showed error as to the second and third counts.

6. In affirming the judgment of the District Court

which plaintiffs in error submit should have been reversed for errors of the District Court duly assigned in the Court of Appeals, towit:

(a) In overruling the demurrers to the Information and the demurrers to each count thereof.

(b) In overruling the motions made at the close of the evidence to dismiss the first count of the Information and the several specifications thereof.

(c) In overruling the motions made at the close of the evidence to dismiss the second count of the Information and each specification thereof.

(d) In overruling the motions made at the close of the evidence to dismiss the third count of the Information.

(e) In overruling the motions to arrest judgment on the first count of the Information.

(f) In overruling the motions to arrest judgment on the second count of the Information.

(g) In overruling the motions to arrest judgment on the third count of the Information.

(h) In overruling the motions to set aside the findings and judgment and to discharge defendants or to grant a new trial.

ARGUMENT.

The District Court was Without Jurisdiction. No Contempt was Alleged or Proved Under the Limitations of section 1 of the Act of Congress.

The District Courts of the United States were created under the authority given Congress by that part of Section 1, Article III. of the Constitution which

provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," and also by that part of Section 8, Article I., which provides that Congress shall have power "to constitute tribunals inferior to the Supreme Court."

By section 1 of the Act of March 2, 1831, c. 99,* 4 Stat. 487, which was retained without substantial charge in the Revised Statute (Sec. 725) and in the Act of March 3, 1911, known as the Judicial Code, and being section 268 thereof, it is provided:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The Information does not allege that any of the publications complained of were brought into the court room or court building by respondents or any one else,

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* The Act of 1831 is printed complete at p. 22 of this brief.

or that the District Judge read any of them; nor is there any finding of fact to that effect (Findings of Fact, R. 105 et seq), nor any evidence which could have been the basis of such finding. The only allegation on the subject in the Information is that the newspaper "for more than five years prior to and up to and including September 17, 1914, was published, sold and widely circulated within the city of Toledo and vicinity, which was the residence of the District Judge."

At the time of its passage and for many years thereafter, the purpose and effect of the Act of 1831 were understood and accepted by judges, who were familiar with the controversaries that occasioned its enactment, and its plain provisions were enforced. Recently, a tendency has been exhibited by judges sitting in cases in which they are in effect the prosecuting parties, to construe away what seems to be the very clear and explicit language of the act, and to assume jurisdiction contrary to its express provisions.

The construction of the statute adopted in the District Court is shown by the third and fifth syllabi prepared by the court, and published with the opinion at R. 109:

> "3. It is provided in Section 268, Judicial Code, that this court may punish as contempt of its authority misbehavior so near its presence 'as to obstruct the administration of justice.' Held, that the criterion whether an alleged misbehavior is within this provision of the act is not the physical or topographical propinquity

of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tending directly to affect the administration of justice."

"5. In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers. It is sufficient if, excluding any other reasonable interpretation of the language of the publication, after applying the ordinary rules for constructing the English language and considering how it may be reasonably understood by ordinary readers, the state of public feeling on the subject-matter of the publication, and any other relevant matter which may reasonably aid in understanding the necessary effect of such publication respecting the pending cause, it is seen to tend to obstruct the administration of justice therein."

History of the Controversy in the United States Prior to the Passage of the Act of 1831.

Prior to the impeachment of Judge Peck, whose acquittal was followed by the Act of 1831, the question of the power of the courts to punish summarily as contempts, newspaper publication, does not appear to have been agitated except in the state of Pennsylvania. Two reported cases (Respublica vs. Oswald, 1 Dallas,

318, in the Supreme Court of Pennsylvania, and Hollingsworth vs. Duane, 6615 Fed. Cas., in the United States Circuit Court for Pennsylvania), promulgated the doctrine that Courts in the United States had a common law power to punish in such cases, and held that the constitutional guarantee of trial by jury had no application. The judges erroneously supposed that by the common law, courts of record in England possessed this power, whereas in truth it had never been so held except as to the courts constituting the aula regis, and in respect to them, on the theory that the sovereign personally dispensed justice (Reg. vs. Lefroy, L. R., 8 Q. B., 134). Oswald on Contempt, 3rd Edition, p. 3, citing 3 Holdsworth, History of English Law, 312, says:

> "In early times, contempt, even in the face of the court, was proceeded against by indictment or other ordinary process, and not summarily."

Referring to the ancient dictum of Wilmot, J., in Sparks vs, Martyn (1669), 1 Vent., 1, that "it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt of the court, acted in the face of it." Oswald says at p. 134:

> "This appears in fact not to have been the case and the judgment in question will be found on examination to depend rather on a somewhat turbid rhetoric than on ratiocination or the examination of authorities."

However, the point that the power to punish summarily, contempt out of court, was at common law con-

fined to the courts of the sovereign, on the theory of his personal participation in their session, was definitely settled in Reg. vs. Lefroy, L. R., 8 Q. B., 134 (1872). In that case an attorney in a pending case before a county court, which was a court of record, published in a newspaper respecting a ruling of the judge the following language:

> "The statement was a monstrosity and, as I can now say without fear of an arbitrary or tyrannical abuse of power, an untruth."

In separate judgments by Chief Justice Cockburn and Judges Mellor and Quain upon a consideration of the old authorities, it was shown that contempts out of court were punishable in the superior courts at Westminster, including the courts of Queens Bench, Common Pleas and Exchequer, on the theory that such courts are divisions of the aula regis "where it is said the King in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign." But it was held that other courts of record, created by Parliament, and not supposed to be coeval with the foundation of the state itself had never had and had never attempted to exercise any such authority.

In Respublica vs. Oswald, 1 Dallas, 318, decided by the Supreme Court of Pennsylvania in July, 1788, and reported at length with an interesting footnote by the reporter it appears that in 1788, one Eleazer Oswald, a publisher at the city of Philadelphia, Pennsylvania,

of the Independent Gazetteer, printed several anonymous pieces "against the character of Andrew Browne, the Master of a Female academy in the city of Philadelphia," on account of which Browne brought an action for libel against Oswald in the Supreme Court of Pennsylvania; and, pending the action, Oswald published various remarks in his newspaper which it was supposed had a tendency to prejudice the public with respect to the merits of the cause. He was cited for contempt on a writ issued by Chief Justice McKean, who had been one of the signers of the Declaration of Independence, and was Governor of Pennsylvania from 1799 until 1808. Mr. Lewis, appearing for the State, insisted that Oswald's "address to the public manifestly tended to interrupt the course of justice;" that "it was an attempt to prejudice the minds of the people in a cause then pending, and by that means to defeat the plaintiff's claim to justice, and to stigmatize the judges whose duty it was to administer the law. There could be no doubt, therefore, that it amounted to a contempt of the Court, and it only remained in support of his motion to show that an attachment was the legal mode of proceeding against the offender."

Mr. Sergeant, for the respondent, insisted that the Court had no power to punish the defendant summarily; that he was entitled under the ninth section of the Bill of Rights of the State of Pennsylvania to a trial by jury. He said:

> "Those contempts which are committed in the face of a Court stand upon a very different

> ground. Even the Court of Admiralty (which is not a court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alleged to have been committed out of doors are not within this reason; they come properly within the class of criminal offenses; and as such, by the ninth section of the bill of rights, they can only be tried by a jury."

The Court, however, held that:

> "It is a contempt, punishable by attachment, to publish remarks in a newspaper which have a tendency to prejudice the public, with respect to the merits of a cause depending in court,"

and fined the respondent ten pounds and imprisoned him for one month.

After Oswald had paid his fine and served his term, he presented a memorial to the General Assembly of the State, giving a history of the proceedings against him, and complaining of the decision of the judges and of his imprisonment, and calling upon the House to determine "whether the judges did not infringe the Constitution in direct terms in the sentence they had pronounced; and whether, of course, they had not made themselves proper objects of impeachment."

The Assembly appointed a committee on the order of procedure, and resolved itself into a committee of the whole, where it heard evidence for three days upon the memorial. After this, Lewis, who had been counsel

for the State in the court proceeding, and was then a member of the House, in an elaborate argument, undertook the vindication of the judges. Mr. Findley, a member from Westmoreland, followed Mr. Lewis, and commenting upon the judgment of the court, he said:

> "That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense, and understood the rules of grammar, was able to determine on a bare perusal of the bills of rights and Constitution. With these aids, he defied all the sophistry of the schools and the jargon of the law to pervert or corrupt the explicit language of the text, and therefore he regretted that, in listening to the ingenuity of Mr. Lewis' paraphrase, his admiration was not necessarily followed by conviction."

Then, after having discussed the ninth section of the Bill of Rights, he said:

> "For outrages committed in the face of the Court, for the misconduct of its officers, and for a disobedience or resistance of its process, there seemed, he said, to be a propriety in establishing an immediate remedy. But this did not extend in his opinion, to the case of constructive contempts; to criminal offenses perpetrated out of the view of the court; nor to such acts as in their nature did not call for a sudden punishment, and which in their operation involved a variety of facts that a jury was only competent to investigate and determine."

The judges escaped impeachment by a vote of 57 to 23, and in 1797 Judge McKean who held extreme views

on the subject generally, bound over Cobbett, who was then publisher of a paper in Philadelphia, on a charge of seditious libel against the King of Spain, but the grand jury returned no bill.

The attempt of Oswald to have the judges impeached failed, but the controversy continued. McKean was thrice elected governor of the state and by his strong personal influence defeated many attempts to limit the authority of the courts to punish contempts by summary process.

In 1804 one Thomas Passmore was attached and fined for contempt by Chief Justice Shippen for the publication in a tavern in Philadelphia of a statement that a party to a case pending before the court had committed perjury (Respublica vs. Passmore, 3 Yeates, 441). Passmore complained to the Legislature against the Chief Justice and two associate judges, which resulted in an impeachment by the House of Representatives and trial by the Senate. In January, 1805, the Senate voted 13 guilty and 11 not guilty, the proceedings failing for lack of the required two-thirds majority.

The struggle for freedom to publish comments on judicial proceedings, without being subjected to summary penalties, was continued in Pennsylvania after the institution of the Federal courts, the judges taking the position that the ruling in Respublica vs. Oswald established their authority. In Hollingsworth vs. Duane, Fed. Cas., 6615 (May 18, 1801), Hollingsworth brought an action for libel against Duane, the pub-

lisher of "The Aurora," a newspaper in Philadelphia. The declaration stated plaintiff to be a citizen of the United States and defendant an alien. Defendant by plea in abatement claimed that the court had no jurisdiction because he was a citizen of Pennsylvania. This point was tried by jury and the jury found defendant to be an alien. While the case was still pending defendant in the issue of his newspaper of May 20, 1801, published an article attacking the court. In Hollingsworth vs. Duane, Fed. Cas., 6616, an attachment was issued against Duane. Lewis who had been counsel in Respublica vs. Oswald, cited English cases as precedents for the power to attach summarily for cases in contempt. Among others he referred to the case of Rakes, an attorney who was held in contempt for printing his brief before the case came on to be tried, in which Lord Hardwicke said:

> "The offense did not consist in the printing, for a man may give a printed as well as a written brief to counsel; but the contempt to this court was prejudicing the world with regard to the merits of the case before it was heard."

Lewis in argument also referred to Oswald's case and the acquittal of Judge McKean by the Legislature in 1788. Dickerson for defendant contended that the power to punish summarily for contempts out of court without a jury "must be looked upon as the exercise of a jurisdiction unfriendly to liberty, dangerous to the citizen and easily capable of being perverted to the most odious purposes." He also contended as had been

contended in the Oswald case that the exercise of such power was in violation of the Constitution of the United States. Judge Griffith, referring to the English cases, said that "for contempts of inferior jurisdictions, not of record, unless same are in the face of the court, there is no other method than by indictment;" but Respublica vs. Oswald was held to be the law and defendant was punished for contempt. The same point was affirmed in United States vs. Duane, Fed. Cas., 14997 (May 22, 1801), where in passing judgment on Duane, Chief Judge Tilghman held that the Constitution of the United States did not guarantee trial by jury in contempt cases, saying:

> "It was determined very solemnly in the Supreme Court of Pennsylvania in the case of Commonwealth vs. Oswald. The present Governor of Pennsylvania was then Chief Justice. He is well versed in the general principles of law as well as the usages and customs of the United States, and can not be supposed to have favored construction unfriendly to true liberty, or unwarranted by the genuine sense of the Constitution. The principles established in the Oswald case, are too strongly founded to be shaken; and I can say with certainty that for the last seven years they have been considered and acted upon as the law of Pennsylvania. The statutes of the United States expressly give to their courts the power of punishing contempts by fine or imprisonment at their discretion, and whoever attends to the expressions of those statutes, will easily perceive that they recognize a summary mode of proceeding."

In 1809, after the death of Governor McKean, the Pennsylvania Legislature in pursuance of a strong public demand, enacted a statute relating to summary punishments for contempt, which is still in force and which provides:

> "The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishment for contempts of court shall be restricted to the following cases, to-wit:
>
> "1. To the official misconduct of the officers of such courts respectively;
>
> "2. To disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court;
>
> "3. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

In addition to the foregoing it was specifically provided that publications out of court shall not be made the basis of summary attachment and punishment.

The history of the controversy in Pennsylvania is found in the note to Respublica vs. Oswald in 1 Dallas, 318, Respublica vs. Passmore, 3 Yeates, 438, and "Constructive Contempt" by John N. Thomas, Ex-judge of the Supreme Court of Missouri.

Judge Thomas makes the following comment, the applicability of which is not limited to the controversy in Pennsylvania (p. 121):

> "To fully appreciate the lessons of these trials we must carefully note the exact point in controversy. The parties imprisoned by the court for contempt, and the public, as represented by

the General Assembly of Pennsylvania, did not contend that the right to slander or libel the courts or the parties to the litigation in the courts existed, but they all, with one accord, objected to the **method** of determining what was libelous or slanderous, the people insisting on the right of trial of such a question by a jury before the courts, while the other party claimed and exercised the right of the interested court to try the issue without a jury."

History of the Act of 1831

After the enactment of the Pennsylvania statute, and similar statutes in other states, the question remained at rest in so far as the United States courts were concerned for more than twenty years. The specific occasion for the enactment of the federal statute was the acquittal upon impeachment proceedings of Judge Peck, a judge of the United States District Court of Missouri who in the year 1825 issued an attachment in contempt against Lawless, an attorney, imprisoned, and disbarred him for a period of eighteen months for printing a criticism upon the reasoning of the judge in a published opinion. Judge Peck was impeached by the House of Representatives by a vote of 123 to 49, was tried by the Senate and acquitted on January 31, 1831, by the narrow margin of 22 to 21.

James Buchanan, afterwards President of the United States, who was one of the prosecutors on behalf of the House, said in part in his speech:

> "I will venture to predict that whatever may be the decision of the Senate upon this impeach-

ment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim."

The day after Judge Peck's acquittal Draper, a representative from Virginia, which state had long had a statute similar to the Pennsylvania statute, introduced in the House this resolution:

> "Resolved that the committee on the judiciary be directed to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States."

On February 10, 1831, Buchanan who was a member of the House from Pennsylvania, and familiar with the Oswald case and the statute of Pennsylvania which had then been in force for twenty-two years, reported a bill from the judiciary committee, which, after amendment, was enacted March 2, 1831. In its original form with title it read as follows (4 Stat., 487):

> **"An Act Declaratory of the Law Concerning Contempts of Court.**
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> "Be it enacted, etc., That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, wit-

ness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

"Sec. 2. And be it further enacted, that if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

Approved March 2, 1831.

In the official statutes published by authority of Congress (Vol. 4), the side-note to Sec. 1 is "Cases for summary proceedings," and the side-note to Sec. 2, "Cases for indictment" *

The judgment in Oswald's case was not only vigorously attacked as unconstitutional at the time, but was made the basis of the impeachment proceedings against Judge McKean. It was never acquiesced in in Penn-

* Sec. 1 of the Act of 1831 is Sec. 725 of the Revised Statutes in the chapter entitled "Provision common to more than one court or judge," and Sec. 2 is Sec. 5399 in the chapter entitled "Crimes against justice." Sec. 2, with slight changes, is Sec. 140 of the Act of March 4, 1909, c. 321, 35 Stat. 1080, entitled an "An Act to cordify, revise, and amend the penal laws of the United States" Sec. 1 is Sec. 268 of The Judicial Code enacted March 3, 1911, c. 231, 36 Stat. 1087, 1163.

sylvania and, although followed as law in the Duane cases, was repudiated as the law of Pennsylvania by the enactment of the statute of 1809.

Peck's case involved the attempt by a United States district judge to punish summarily for contempt a publication referring to a case which had terminated. But it does not follow that Congress in enacting the act of March 2, 1831, intended to confine the limitations of the statute to such cases. If that had been the intention it could have been very easily expressed. It is rather to be presumed that Congress had in mind the controversy which had raged in Pennsylvania. Buchanan who was a member of the House from that state and a member of the committee on the judiciary, undoubtedly was familiar with the struggle against the arbitrary power of the judges which had ended with the enactment of the Pennsylvania statute in 1809. As one of the prosecutors of Peck before the Senate he contended that "our courts have no right to punish, as for contempts, in a summary mode, libels, even in pending cases" (Gales and Seatons Register of the Debates, 1831, p. 42). Mr. McDuffie of South Carolina one of the prosecutors on behalf of the House in his speech of December 20, 1831, said:

> "The correct principle, then, was this: the courts of the United States had no power to punish for contempt, further than their own self preservation required. It was necessary that they should possess the power to protect themselves in the administration of justice; to

> prevent and punish direct outrages on the court; to prevent the Judge from being driven from the bench, the jury from being assaulted and the regular and fair administration of justice from being impeded. * * * It must be a flagrant outrage in the face of the court to justify a summary punishment for contempt."

He also criticised most vigorously the attempt to import into the United States the theory of the courts of England that they could punish for contempts summarily upon the ground that "they were administering the King's justice, were an emanation of his power, and that the same principle that protected the character and person of the King as sacred protected those of his Judges in like manner."

Cases Under the Act of 1831

That the meaning of the law, which seems upon its face to present no ambiguity, was clearly understood at the time of its enactment is shown by the first decision under it.

In Ex parte Poulson, Fed. Cas., 11350 (Circuit Court for the Eastern District of Pennsylvania 1835), decided by Mr. Justice Baldwin, a rule was directed to the editor of the "American Daily Advertiser" to show cause in contempt for publishing an article concerning the plaintiff in a suit then pending, in which plaintiff was described as a counterfeiter and plaintiff's witness attacked. After condemning in the severest language the publication as being calculated to produce

the worst effect upon the administration of justice, Mr. Justice Baldwin said:

> "The first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial, or in any way pending before it."

After quoting the Act of 1831, he says:

> "The history of this act, the time of its passage, its title and provisions must be considered together, in order to ascertain its meaning and true construction. It was enacted shortly after the acquittal of Judge Peck, of Missouri, on an impeachment preferred against him for issuing an attachment against a member of the bar for making a publication in relation to a suit which had been decided by that judge. On the trial the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause during its pendency, and all admitted its illegality when done while the cause was actually on trial. It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of the judiciary act, Sec. 17 (1 Stat., 83), as declared by the Supreme Court, to protect their suitors by the process of attachment.
>
> "With this distinct knowledge and recognition of the existing law, it cannot be doubted, that the whole subject was within the view of

the Legislature; nor that they acted most advisedly on the law of contempt, intending to define in what cases the summary power of the courts should be exercised, and to confine it to the specified cases. * * *

"It would ill become any court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power. It is not like a case where the right of property or personal liberty is intended to be affected by a law, which the court would construe very strictly to save a right granted or secured by any former law. Neither is it proper to arraign the wisdom or justice of a law to which a court is bound to submit, nor to make an effort to move in relation to a matter when there is an insuperable bar to any efficient action.

"The law prohibits the issuing of an attachment, except in certain cases, of which the present is not one. It would therefore be not only utterly useless, but place the court in a position beneath contempt, to grant a rule to show cause why an attachment should not issue, when an exhibition of the act of 1831 would show most conclusive cause. The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published upon either without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most wilful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of

causes by out of door influence practiced with impunity.

"With this limitation on the summary jurisdiction of the court, and the want of any legal provision making it cognizable by indictment, we cannot say that the publication which is the ground of this motion, or any other, is or can be any disturbance of the business of the court. The action of the press is noiseless, producing the same effects, far or near, it matters not. The business of the court is not interrupted. Judges and jurors can perform their functions on the bench and in the box by confining their attention to the law and evidence."

In United States vs. Holmes, Fed. Cas., 15853, decided by Mr. Justice Baldwin in 1842, the court, on account of the sensational character of the testimony announced that newspaper reporters would not be permitted to come within the bar of the court except on condition of suspending publications until the trial was concluded. Mr. Justice Baldwin gave as the reason for issuing such order that:

"By an act of congress, passed some years since, the court has no longer the power to punish, as for contempt, the publication of testimony pending a trial before us."

Ex parte Bradley, 7 Wall., 364 (1868), presents the following case: Bradley was guilty of misbehavior before Mr. Justice Fisher, who was a justice of the Supreme Court of the District of Columbia, while holding a session of the Criminal Court of the District, and

the Supreme Court of the District punished him by disbarment on account of his offensive conduct and language towards one of its members. This court held that the Criminal Court was a separate court and that the Supreme Court was without jurisdiction. Mr. Justice Nelson in delivering the opinion granting a writ of mandamus to restore Bradley to his membership of the bar said (p. 372):

> "Under such circumstances, and in this posture of the case, it is plain that no authority or power existed in the Supreme Court to punish for the contempt thus committed, even without reference to the act of Congress of 1831, which, in express terms restricts the power, except for 'misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice' "

In 1872-3 Judge Curtis, formerly justice of the court, in his lectures before the Harvard Law School, after stating that the Act of 1831 was passed in consequence of what occurred in connection with the impeachment proceedings against Judge Peck, quoted the Act and said:

> "The common-law authority of the courts, as it has been exercised in England and in this country, and as it was exercised by Judge Peck in the case I spoke of, extended much wider than this. It extended so far as to punish the editor of a newspaper for publishing an account of a trial while the trial was in progress, and there were many other cases to which this power to punish for contempt extended. It is now re-

> stricted either to the action of the court upon its own officers, to prevent them from committing a breach of official duty, or to contempts, as they are called, in the presence of the court, or **so near to the court as to disturb its proceedings,** or to some misconduct of a juror or other person who disobeys an order of the court. If a juror, for instance, or a witness, disobeys the order of the court to attend, a process of attachment will issue against him under the provisions of this statute; but, **with the exception of these cases, the courts of the United States have no power to punish for contempt.**" (Curtis on Jurisdiction of the United States Courts [2nd Ed.], 176).

In ex parte Robinson, 19 Wall., 505, 510 (1873), the opinion was delivered by Mr. Justice Field, who said:

> "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the Courts of the United States were called into existence and vested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831 (4 Stat. L., 487). The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt; but that it applies to the circuit and district courts there can be no ques-

tion. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence, or subsequent Acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: First, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the courts in his official transactions, and, third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised **to insure order and decorum in their presence,** to secure faithfulness on the part their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

The District Judge says that the opinion of Mr. Justice Field is dictum and that the action of the Supreme Court in refusing to review In re McCanlly, 198 U. S., 582, 586, on petition for writ of certiorari "is equivalent to an overruling of Judge Field's holding" (R. 141). But the refusal of an application for a writ of certiorari "is in no case equivalent to an affirmance of the decree that is sought to be reviewed." Hamilton Shoe Co. vs. Wolf Brothers, 240 U. S. 251, 258.

McCaully's case, 25 App. D. C., 404, involved the corrupt solicitation of a juror in a pending cause by an attorney. It was held that the fact that the solicitation occurred away from the court after the jury had been permitted to disperse did not deprive the court of jurisdiction. The court said that the juror "is a part of the court wherever he is;" "is as much a part of what may be designated the machinery of the administration of justice as is the judge." It was accordingly held that interference with a juror personally came within the statute.

In In re Edward S. May, 1 Fed., 737 (1880) the judge, afterwards Mr. Justice Brown, punished for contempt a juror who corruptly negotiated with the defendant in a pending criminal case as to the verdict which should be rendered. The distinct ground of the judgment was that the juror disobeyed the order of the court (p. 743). The court after quoting the Act of Congress, then R. S. Sec. 725, makes the following statement:

> "The Act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

In United States vs. Anon., 21 Fed., 761 (1884), where District Judge Hammond held that a party to a case could be punished for threatening an examiner at a taking of testimony, it was said at p. 768:

> "It is generally understood that the object of that statute (R. S., Sec. 725), which has been substantially enacted in Tennessee (Code Sec.

> 4106), and other states, was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the courts, their officers, and proceedings, as contempts which tend to impair respect for the tribunal and thereby obstruct the administration of justice."

In Ex parte Schulenburg, 25 Fed., 211 (1885), petitioner, a ctizen of Missouri who came to Detroit to attend a trial in the Federal Court, was served with a writ of garnishment from the state court and thereupon applied to the Federal Court to set aside said process and restrain further proceedings. The first application was denied by Mr. Justice Matthews and by Judge, afterwards Mr. Justice Brown. On the second application Judge Brown delivered an opinion stating:

> "The difficulty in this case, however, arises from the statutes of the United States, one of which (Sec. 720) inhibits injunctions to stay proceedings in any court of a state except in bankruptcy cases, and the other of which (Sec. 725) limits our jurisdiction in cases of contempt to misbehaviors of any person in the presence of the court, or so near thereto as to obstruct the administration of justice, etc. . . . . Conceding that the service of the writ of garnishment was a contempt at common law, I doubt seriously whether it is a misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice. Clearly it falls within no other clause of Sec. 725.

> These words seem to me to refer rather to riotous or unseemly conduct in the court room, or in such immediate proximity thereto as to interrupt the sessions of the court or the orderly conduct of business therein, and not to embrace constructive contempts of its authority."

Savin, Petitioner, 131 U. S., 267, and Cuddy, Petitioner, 131 U. S., 280, were both decided May 13, 1889, Mr. Justice Harlan delivering the unanimous opinion in each case.

Savin appealed from a judgment of the District Court committing him to jail for contempt. The charge was that in the jury room of the court, being used for witnesses, and also in the hallway of the court building immediately adjoining the court room, he undertook to bribe witnesses not to testify against defendant in a pending criminal case. Mr. Justice Harlan, after quoting in full the Act of March 2, 1831, held that although the offense stated was punishable by indictment that mode is not exclusive when a misbehavior is in the presence of the court or so near thereto as to obstruct the administration of justice. At page 276 he said:

> "The Act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice. Ex parte Robinson, 19 Wall., 505, 511. And although the word 'summary' was, for some reason, not repeated in the present revision, which invests

the courts of the United States with power 'to punish by fine or imprisonment, at the discretion of the court, contempts of their authority' in certain cases defined in Section 725, we do not doubt that the power to proceed summarily, for contempt, in those cases, remains, as under the Act of 1831, with those courts. It was, in effect, so adjudged in Ex parte Terry, above cited.

"The question then arises, whether the facts recited in the final order in the District Court as constituting the contempt—which facts must be taken in this collateral proceeding to be true —make a case of misbehavior in the presence of that court, or misbehavior so near thereto as to obstruct the administration of justice therein. There may be misbehavior in the presence of a court amounting to contempt, that would not, ordinarily, be said to obstruct the administration of justice. So there may be misbehavior, not in the immediate presence of the court, but outside of and in the vicinity of the building in which the court is held, which, on account of its disorderly character, would actually interrupt the court, being in session, in the conduct of its business, and consequently obstruct the administration of justice."

And adding at page 278:

"We are of opinion that the conduct of the appellant, as described in the final order of the District Court, was misbehavior in its presence, for which he was subject to be punished without indictment, by fine or imprisonment, at its discretion, as provided in Section 725 of the Revised Statues. And this view renders it un-

> necessary to consider whether, as argued, the words 'so near thereto as to obstruct the administration of justice' refer only to cases of misbehavior, outside of the court-room, or in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court, while in session, as to actually interrupt the transaction of its business."

In the case of Cuddy (131 U. S., 280), petitioner had been convicted in a contempt proceeding of approaching and attempting to influence a prospective juror whose name had been drawn and who was being sworn on voir dire. An attempt was made to distinguish the case from the Savin case on the ground that the record did not show that petitioner's act occurred in the court-room, or while the court was in session. At page 284 Mr. Justice Harlan said:

> "But both the petition for habeas corpus and the record of the District Court are silent as to the particular locality where the appellant approached McGarvin, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case of United States vs. Young. That which, according to the finding and judgment, the appellant did, if done in the presence of the court, that is, in the place set apart for the use of the court, its officers, jurors and witnesses, was clearly a contempt, punishable, as provided in Section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment. Savin, Petitioner, ante, 267."

After holding that the District Court is presumed to

act within its jurisdiction, the court held that as the record did not show a case without the jurisdiction of the court "it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here." At page 286 it was said:

> "We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under Section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record. But he made no such allegation in his application, and, so far as the record shows, no such proof."

In stating that the petitioner would "have been entitled to the writ" and "to have been discharged" upon proving certain facts, Mr. Justice Harlan evidently meant the facts which Cuddy's counsel claimed to have existed, namely, that his improper solicitation of the prospective juror, "did not occur in the court building."

In Morse vs. Montana Ore Purchasing Co., 105 Fed., 337 (1900), referred to in the opinion of Judge Killits below, District Judge Knowles granted a new trial on the ground that there was undue influence exerted as to the jury by objectionable newspaper publications,

editorials and articles which, in the language of the judge, were "well calculated to arouse prejudice against the plaintiff in this cause," and were "written with a view to influencing in some way the determination of this cause" (p. 345). It was claimed (p. 347) that the plaintiff "ought to have had the parties publishing these articles brought into court and punished for contempt, or ought to have applied to the court for a continuance of the cause on account of the prejudice created by them, and by a failure so to do waived the right to present the question upon a petition for a new trial." In overruling this objection the judge said that "it was extremely doubtful as to the right of plaintiff to ask that the publishers of this newspaper be brought into court and examined upon the charge of contempt." He referred to the statement of Mr. Justice Nelson in Ex parte Bradley, 7 Wall., 364, 372, that the statute "in express terms restricts the power, except for misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice," and the statement of Mr. Justice Field in Ex. parte Robinson, 19 Wall., 505, 511, that the power "can only be exercised to insure order and decorum in their presence," etc., and said (p. 347):

> "The Independent's publishers seemed to have been advised of the limited power of the court in this matter; for, in the publication of that paper made immediately after Col. Sanders had called attention to its article, it refers to the fact that it had not brought its paper into court, or hawked it in the presence of the court."

In Boyd vs. Glucklich, 116 Fed., 131 (1902), before Circuit Judges Caldwell, Sanborn and Thayer, in the Circuit Court of Appeals for the Eight Circuit, Judge Caldwell, delivering the opinion, and referring to the Act of 1831, said, at p. 136:

> "Since the passage of this act the power of these courts in the punishment of contempts can only be exercisd (1) to insure order and decorum in their presence; (2) to secure faithfulness on the part of their officers in their official transactions; and (3) to enforce obedience to their lawful orders, judgments and processes. Formerly the only protection the citizens had against the unjust, oppressive, or illegal exercise of this power was found (in the language of Judge Brewer in Re Pryor, 18 Kan. 72, 26 Am. Rep. 747) 'in the publicity of all judicial proceedings, and the appeal' which may be made to the legislature for proceedings against any judge who proves himself unworthy of the power entrusted to him.' The case of Judge Peck is not the only instance in which redress was sought against the unwarranted exercise of this power by the impeachment of the judge. In 1807 articles of impeachment were preferred against the judges of the Supeme Court of Pennsylvania for an abusive exercise of this power, and, while they were acquitted, their trial led to the passage of the act of the assembly of that state of 1809, limiting and restricting the power of the court to punish for contempt; and impeachment of judges for similar acts and like legislation has taken place in other states. Indeed, in this country the power of the courts to punish

> for contempt has always been looked on with jealousy and a very strong disposition shown to restrict it. It has been declared to be 'arbitrary in its nature' (Batchelder vs. Moore, 42 Cal. 412); to be an exception to the provisions of the Constitution of the United States, and not to be extended in the least degree beyond the limits imposed by statute;" citing authorities and quoting the statement in a note in Kent, Comm., 330, "that the power of the courts to punish summarily for contempts has lately been much restricted in England."

In Ex parte McLeod, 120 Fed., 130 (1903), which was an attachment in contempt for assaulting a United States Commissioner in the performance of his official duties, no penalty was inflicted although the court expressed the opinion that one could be inflicted. In the course of the opinion District Judge Jones said (p. 137):

> "Congress intended by this statute to put an end to the power of any Federal Court to prevent, by punishment as for contempt, criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice. The statute was drawn by Mr. Buchanan, one of the managers of the (Peck) impeachment, who afterwards became President. It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision taken from a similar statute in Pennsylvania, had in mind anything more than to prevent the punishment, as for a contempt, of exercise of the right of free speech

and liberty of the press in criticising and denouncing judicial acts."

In Cuyler vs. Atlantic & N. C. R. Co. (In re Daniels), 131 Fed., 95 (1904), a United States judge appointed a receiver for the Atlantic and North Carolina Railroad Company in a proceeding pending before the court for that purpose. Shortly thereafter and while the receiver as an officer of the court was in charge of the railroad the petitioner Josephus Daniels published an editorial in his paper "at Raleigh, N. C., where the court was held" (p. 98)), severely criticising the court for appointing the receiver, and, on an order to show cause it appeared that divers other editorials reflecting on the official integrity of the court had been published in the same paper. A writ of habeas corpus to release Mr. Daniels from arrest was presented to Circuit Judge Pritchard on the allegation that the attachment was a nullity, for want of jurisdiction in the court issuing it, by reason of the provisions of Section 725 of the Revised Statutes. Judge Pritchard's opinion is a careful examination of the statute and authorities. He quotes (p. 96) from a note to page 340 of Vol. 1 of Kent's Commentaries as follows:

> "That Act (1831) had withdrawn from the courts of the United States the common-law power to protect their suitors, officers, witnesses and themselves against the libels of the press, however atrocious, and though published and circulated pending the very trial of the cause."

Continuing, Judge Pritchard says:

> "Under the Judiciary Act of September 24, 1789, c. 20, Sec. 17, courts of the United States were given 'power to punish by fine or imprisonment, at the discretion of the said court, all contempts of authority, in any cause or hearing before the same.' The Act of 1789 did not define or limit the power or authority of the court of the United States to inflict summary punishment in any cause or hearing before them. It was also silent as to any rules of procedure for determining what constituted contempt. As to what particular acts constituted contempt, as well as the mode of procedure against the offender, was to be determined in accordance with the established rules and principles of the common law with reference to existing conditions. Under this Act it was contended that the authority which the courts had to punish for contempt at their discretion had been greatly abused, and, in order that the citizen might not be subjected to annoyance on account of the commission of acts not contemplated by the law, and that the freedom of the press as well as the liberty of the individual might be preserved in the spirit guaranteed by the Constitution, Congress defined the limit to which the courts could go in such cases. Section 725 of the Revised Statutes is in the nature of a limitation of the power of the court to punish for contempt." (Bottom page 97, top page 98).

Continuing the discussion of Section 725, and applying its provisions to the case then before him, Judge Pritchard said:

"The record does not show that the alleged misbehavior of the petitioner was in the presence of the court, or so near thereto as to obstruct the administration of justice; nor is there anything to show that the alleged misbehavior of petitioner interfered with the court, or that it tended in the slightest degree to disturb the orderly proceedings of the court. The inherent power of the court to punish for contempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore, it is only such acts as tend to interfere with the orderly proceedings of the court, or with the due administration of justice that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt."

He points out what he conceives to be a limitation upon the broad language used by Judge Brown in In re May, where he said:

"The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

Judge Pritchard states at page 99 that in his opinion:

> "There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance if a newspaper editor should publish an article concerning a trial which was being considered by a jury and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

The question suggested by Judge Pritchard, as applied to the Ohio statute, was presented in Myers vs. The State, 46 Ohio St., 473 (1889), in which the court held as shown in the first official syllabus that:

> "The furnishing by a correspondent for publication, and procuring to be published in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case upon trial, which, if true, would render him an unfit person to preside at the trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable ground to believe that the same will, when published, be circulated in the court room and about the court house

during said trial, and there read, **and which was, afterward, during the trial, circulated and read therein,** is a contempt of court."

The opinion states (p. 474) that:

> "The newspaper had an extended circulation throughout the state, including the county of Franklin, and was freely circulated, sold and read about the court house and in the court room, all which was known to the plaintiff in error at the time of the writing and publishing. The article was, in fact, read on the day of its publication, by many persons in the court room, **was much talked about within the bar of the court, and in the presence and hearing of the court.**"

The contempt in United States vs. Huff (D. C.), 206 Fed., 700 (1913), consisted in writing and sending letters to a federal judge relating to a pending suit by the defendant therein. Much of the letters was devoted to personal abuse of the judge, either personally or because of his past actions in the suit, and also contained reference relating to action to be taken in the future, with implied threats in case such action did not conform to defendant's views.

The following cases have been decided since the publication of Judge Killit's opinion.

In re Independent Publishing Company, 228 Fed. 787 (December, 1915, District Court for the District of Montana), affirmed at 240 Fed. 849 (1917) by the Circuit Court of Appeals for the 9th Circuit, the publisher of a newspaper was found guilty of contempt for pub-

lishing an article concerning a person on trial for felony which was read by the jurors and made necessary a discharge of the jury and a new trial. The opinions of the District Court and of the Circuit Court of Appeals both cite Judge Killit's opinion. The Circuit Court of Appeals relies particularly upon Patterson vs. Colorado, 205 U. S. 454, without noting that that case involved no question under section 268 of the Judicial Code and that it was dismissed by this court for want of jurisdiction.

In United States vs. Providence Tribune Co., 241 Fed. 524 (1917, District Court, District of Rhode Island), the publisher of a newspaper was punished for contempt in publishing an article relating to certain criminal proceedings before the Grand Jury.

Cases relied on below which are not in point.

Patterson vs. Colorado, 205 U. S., 454 (1907), cited in the opinion of Judge Killits, was a writ of error to the Supreme Court of Colorado to review its judgment upon an information for contempt, on the ground that rights of the plaintiff in error under the Fourteenth Amendment of the Constitution of the United States had been infringed. This court held that there was no foundation for such claim and dismissed the writ for want of jurisdiction. Nothing was decided except that the case did not involve a Federal question, the court saying (p. 461) that "what constituted contempt, as well as the time during which it may be committed, is a matter of local law." The Act of Congress of 1831 was not involved or mentioned.

It is interesting to note that Mr. Justice Harlan dissented because, in his judgment, "the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution," and that Mr. Justice Brewer dissented on the ground that the claim asserted by the plaintiff in error under the Federal Constitution could not "be regarded as a frivolous one."

Eilenbecker vs. District Court of Plymouth County, 134 U. S., 31 (1890), cited by the trial court was also a writ of error to a state court. The case involved a proceeding in contempt for wilful disobedience of an injunction. This court held that the Fourteenth Amendment did not guarantee trial by jury in such a case in a state court. Referring to the Act of 1831, Mr. Justice Miller said (p. 38),—

> "that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court."

The publications not having been read by the judge while he had the Doherty suit under consideration, are not within the statute.

We have pointed out that in the present case it is not alleged or proved or found as a fact in the findings of fact (R. 105) that the publications complained of were ever circulated in the court house or that they

were read by Judge Killits while he had the case of Doherty under consideration or at any other time prior to the filing of the Information. On this subject Judge Killits says in his opinion (R. 172):

> "It is urged that it is neither averred nor proven that any of the publications involved ever came to the attention of the judge of the court. In our judgment this is nothing. The question is not, did the misbehavior embarrass the court or obstruct justice in either of the directions alleged, but whether they were calculated—tended—to such results. It is not what respondents actually accomplished, but what they intended and tried to do, for which they should be held. Attempts to commit crimes are themselves crimes."

Where the question is, whether a newspaper article published outside the court, constitutes misbehavior so near thereto as to obstruct the administration of justice, the necessary nearness cannot be imputed in the absence of such knowledge of the publication by the court or jury as did or might have obstructed the administration of justice.

In the Huff case the objectionable publication was brought to the attention of the Judge by the deliberate act of respondent; in the Myers case the offending newspaper was brought into court during the trial, read in the court room, and commented upon within the presence and hearing of the court and jury. The case suggested by Judge Pritchard in In re Daniels, 131 Fed. 95 was this:

> "For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

It may be conceded that in such cases the "physical or topographical nearness" of the place where the article is written or printed, becomes immaterial. The essential physical nearness is imported into the case by the publication of the offending article in the very presence of the court or jury. In such case the article as said by the Supreme Court of Ohio in the Myers case not only has its effect in the court house, just as much as if the writer were in court himself and verbally uttered his opinions, but it is in fact an offense in the physical presence of the court.

It may be that an act which is in intention and effect contumacious, committed in the presence of the court, is punishable without regard to whether it actually obstructs justice. But where, as in this case, the question is, whether a newspaper article published outside the court, constitutes an act done in the presence of the court, or so near thereto as to obstruct the administration of justice, within the meaning of the statute, a publication which might have come within the statute,

that is might have been so near the court as to obstruct the administration of justice, if it had been brought to the attention of the court, cannot be brought within the terms of the statute unless it be shown that the judge or jury actually had knowledge of the publication so that they could or might have been embarrassed by it. You cannot bring a publication outside of court within the terms of the statute on the theory that its communication to the court or jury does away with any other physical or topographical nearness required by the statute, and at the same time dispense with the essential requirement that it should actually be brought to the attention of the court or jury in such manner as to interfere with or obstruct their deliberations.

The District Judge while holding that it was immaterial "whether any of the publications involved ever came to the attention of the judge of the court" adds (R. 172):

> "Besides the order for an Information, offered and received in evidence without objection, recites that each of the publications were seen by the judge as a daily reader of the News Bee. In cases of this kind it is competent for the court to take judicial notice of pertinent facts which come within the cognizance of the judge's senses. Myers vs. State, 46 Ohio St., 473, 492."

But no facts are "pertinent" except those alleged in the Information. The order for an Information can not supply material defects in the allegations of the Information itself, and, being ex parte and unsworn, its recitals are not evidence at the trial. It was not offered

or received in evidence for that purpose, but only to show that the Information had been ordered by the court. The court did not assume to take judicial notice of anything. It made a finding of facts (R. 105), in which nowhere appears a finding that the publications complained of were read by the court prior to the filing of the Information, nor does the order for an Information so recite. The statement therein (R. 2) is that "sundry numbers" of the Toledo News Bee for dates between March 24, 1914, and September 17, 1914, came to the attention of the judge as a daily reader, and that said numbers of the News Bee contained "news articles, cartoons and editorial utterances" complained of. It is not stated that the court read any of said news articles or editorial utterances so contained in said numbers of the News Bee.

In In re Reese, 107 Fed., 942, 948 (C. C. A., 8th Cir.), the court, after quoting from decisions of this court and other courts, in which it is held that a proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the rules of construction which prevail in criminal cases, said (p. 948):

> "It follows from these well recognized principles that the petitioner was entitled to be informed of 'the nature and cause of the accusation against him,' and to be tried on the charge as made, and on no other charge."

But it is unnecessary to pursue the point in view of the distinct ground of judgment stated by the District Judge in the following syllabus (No. 5, R. 110) prepared by him as part of his opinion:

> "In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge, or that it had any influence on the consideration of the cause to which it refers."

The contempt proceeding was not instituted, nor were the sentences imposed, for any purpose authorized by section 1 of the Act of 1831, but for the punishment of past offenses punishable only by indictment under section 2.

The obvious distinction in an analagous case is recognized in Marshall vs. Gordon, 243 U. S. 521, 540, 542. At page 542 the Chief Justice, referring to the power of the House of Representatives to commit for contempt said that—

> "from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed."

The Information in our case was filed at October term, 1914. None of the publications were made during that term. Those complained of in the first six specifications of the first count were made during

October term, 1913. All the rest of the publications mentioned in the Information were made during April term, 1914.

It had been demonstrated more than six weeks before the Information was filed that none of the publications had in fact obstructed the administration of justice. The court had filed its opinion (R. 348) and awarded its injunction (R. 357) in Doherty's suit on September 12, 1914, and there had been no resistance. The irritation or fear which the Court of Appeals suggests might have been produced by the publication upon the mind of the judge, were also a thing of the past. But they would not have been ground for summary punishment under section 1 of the Act of 1831 even in a proceeding immediately instituted.

It was held in Marshall vs. Gordon that the acts for which the relator was committed were not "of such a character as to bring them within the implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed." At p. 545 the Chief Justice said:

> "there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made

in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt replied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts."

Recent English Cases

McLeod vs. St. Aubyn (1899) A. C. 549, was an appeal to the Privy Council from a judgment of contempt for publishing in a newspaper on the Island of St. Vincent, a scandalous article respecting the Acting Chief Justice of the Supreme Court. Speaking of process of contempt in such cases, Lord Morris delivering the judgment of the Council said at p. 561:

> "It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases.

> Committals for contempt of court by scandalising the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of colored populations, the enforcement in proper cases of committal for contempt of court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the court."

The foregoing language of Lord Morris in McLeod vs. St. Aubyn, is cited approvingly in the article by J. F. Oswald, K. C., and P. Stanley Oswald, on "Contempt of Court" in 3 Encyclopedia of the Laws of England.

Constructive contempts were not known to the early law of England. Bacon's Abridgement defines the power of a court in contempt cases comprehensively, as follows:

> "Every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the Judge or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody." (2 Bac. Abr., 7th Ed., p. 399).

That it is not an essential prerogative of a court that it should have power to punish summarily con-

tempts committed out of court is fully demonstrated by the fact that in England courts other than His Majesty's High Court of Justice and the divisions thereof which by a legal fiction are supposed to act for the sovereign personally have never had such power. See 3 Encyclopedia of the laws of England, page 500 "Contempt of Court" where it is said:

> "The jurisdiction of inferior courts of record (such as the Court of Quarter Sessions, the Mayor's Court and County Court) is confined to such contempts as are perpetrated in facie curiae (as in R. vs. Lefroy, 1873, L. R. 8, Q. B. 134, and R. vs. Jordan, 1888, 57 L. J. Q. B. 483), and does not extend to such as are committed out of court unless by virtue of some statutory enactment. (R. vs. Lefroy, supra; R. vs. Judge of Brompton County Court [1893] 2 Q. B. 195; Ex parte Pater, 1864, 5 B. & S. 299; Carus Wilson's Case, 1845, 7 Q. B. 984; 68 R. R. 626)."

In In re Clements (1876), 46 L. J. Ch. 375 at 385, Sir George Jessel, M. R. used the following language which was cited with approval in In re Maria Annie Davies (1888), 21 Q. B. D. 236, 239:

> "It seems to me that this jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of the Judge, to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a

> Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him of accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

In Hunt vs. Clarke (1889), 37 W. R. 724, 725, Lord Justice Cotton dealing with an application to commit the publisher of a newspaper for publishing an account of a trial then pending, which was alleged to tend to prejudice the minds of the public against one of the parties, said:

> "In my opinion, no application to commit for contempt ought to be made unless the offense was of so serious a nature as to render the exercise of this summary jurisdiction necessary to prevent interference with the course of justice; and though there is here technically a contempt, I cannot see any such fear of serious interference with the course of justice or prejudice to the defendant as to justify the Court in interfering with this summary and arbitrary process."

The Findings of Fact

These appear in the record at pp. 105-108. Beginning at the top of p. 106 are the findings as to each

publication on which the judgment is based. For the convenience of the court we submit the following schedule showing the pages of the record at which may be found, (1) each publication held to be in contempt, (2) the specification of the Information based thereon, (3) the paragraph of the respondents' answer thereto, and (4) the finding of the court thereon:

First Count

News Bee of March 24 (R. 369); specification 1 (R. 5); answer, paragraph 1 (R. 95); finding 1 (R. 106). The opinion in Doherty's suit filed March 30, referred to in respondents' answer is at p. 303 of the record.

News Bee of March 25 (R. 370 and 377); specifications 2 (R. 19) and 3 (R. 22); answer, paragraphs 2 and 3 (R. 95, 96); finding 2 (R. 106). The testimony of J. W. Wilson, clerk of the court, shows that the motion to make the City of Toledo a party defendant in Doherty's suit was granted ex parte by telephone direction from Cleveland (R. 198).

News Bee of March 26 (R. 371); specifications 4 (R. 25) and 5 (R. 32); answer, paragraph 4 (R. 96) and 5 (R. 96); finding 3 (R. 106). The opinion in Doherty's suit filed March 30, referred to in respondents' answer (par. 5) is at p. 303 of the record.

News Bee of March 27 (R. 372); specification 6 (R. 33); answer, paragraph 6 (R. 96); finding 4 (R. 107). The editorial, part only of which is given in the specification, is printed in full at p. 97.

News Bee of August 14 (R. 378); specification 10

(R. 55); answer, paragraph 10 (R. 99); finding 5 (R. 107).

News Bee of September 5 (R. 58); specification 11 (R. 58); answer, paragraph 11 (R. 99); finding 6 (R. 107).

News Bee of September 9 (R. 58); specification 12 (R. 58); answer, paragraph 12 (R. 100); finding 7 (R. 107).

News Bee of September 10 (R. 376); specification 13 (R. 59); answer, paragraph 13 (R. 100); finding 8 (R. 107).

News Bee of September 11 (R. 378); specification 14 (R. 65), finding 9 (R. 107).

News Bee of September 12 (R. 377); specification 15 (R. 67); answer, paragraph 15 (R. 100); finding 10 (R. 107).

Second Count

News Bee of September 14 (R. 379); specification 2 (R. 74); answer, paragraph 2 (R. 101); finding (R. 107, 108).

News Bee of September 14 (R. 379); specification 3, Dennis note (R. 74); finding (R. 108).

Third Count

News Bee of September 17 (R. 379); specification (R. 78); answer (R. 102-103); finding (R. 108).

There is no finding as to the following publications, nor on account of any publications between March 27 and August 14:

March 28 (R. 375); specification 7 (R. 44); answer, paragraph 7 (R. 98).

March 30 (R. 373); specification 8 (R. 45); answer, paragraph 8 (R. 98).

March 31 (R. 374); specification 9 (R. 48); answer, paragraph 9 (R. 98).

There is no finding that any publication complained of was brought into the court room or court building by respondents or by any one else, or that the District Judge read any of them. The only allegation on the subject in the Information is that the Toledo News Bee "for more than five years prior to and up to and including September 17, 1914, was published, sold and widely circulated within the city of Toledo and vicinity, which was the residence of the District Judge."

The Case of Doherty & Co. vs. The Toledo Railways & Light Company.

The Information alleges that the street car system was managed and operated for The Toledo Railways & Light Company continuously from 1913, by Doherty & Company, under a contract entered into in the Spring of 1913 for the management thereof for the Street Car Company; that with the close of March 27, 1914, practically all the franchises owned by the Street Car Company on the streets of Toledo expired; that in November, 1913, the council of said city passed an ordinance known as the Schreiber Ordinance to go into effect March 28, 1914, on the expiration of said franchises of said Street Car Company; and that The Toledo Rail-

ways & Light Company and Doherty & Company promptly notified the city that they could not accept the terms of said ordinance and would not operate their cars thereunder (R. 4). The statement in the Information that by the terms of the ordinance the company was "required" to convey passengers upon the streets of said city at a rate of not to exceed 3 cents including transfer is inaccurate. The ordinance is printed in full in the answer of the respondents (R. 89-91). It did not require the Street Railway Company to operate after the expiration of its franchise; it provided only that upon the terms and conditions of the ordinance, and upon no other, consent, permission and authority was given to the Street Railway Company to operate its cars "on the streets and portions of streets whereon franchises expire on said March 27, 1914." The Information alleges (R. 4) that the Railway Company promptly notified the City that it could not accept the ordinance. Its right to operate on the streets in question therefore expired on March 27, 1914. No justiciable question was involved, nor, in view of prior decisions of this court, any federal question.

The decision in Detroit United Railway vs. City of Detroit, 229 U. S., 39 (1913), is fairly stated in the third syllabus:

> "Where a street railroad company is operating in the streets of a city for a definite period and has enjoyed the full term granted, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property

> from the streets, without impairing any contractual obligation protected by the Federal Constitution or depriving the company of its property without due process of law. 156 Michigan, 106, affirmed."

The court (p. 45) rejected "the claim of an implied contract to permit the Railway to remain in the streets under such reasonable arrangements for public service as the situation might require" Mr. Justice Day saying:

> "The right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the terms of the instrument of grant."

In Cleveland Electric Railway Company vs. Cleveland, 204 U. S., 116 (1906), cited by the District Court, it was recognized that an ordinance affecting a street railway franchise after its expiration as originally granted "is not void under the impairment clause of the Federal Constitution." Relief was granted in that case because the city, after the expiration of the franchise, passed an ordinance granting the rails, poles, operating appliances and other property to another company upon payment of a sum to be adjudicated as its value. This ordinance was held to be void "as depriving the owner of its property without due process of law."

The facts with respect to Doherty's suit and the

proceedings thereunder are set forth in the answer of the respondents beginning with the last paragraph on p. 92 to p. 95. The pleadings, orders and opinions are printed at pp. 232 to 357. The docket entries (R. 358) show the proceedings in chronological order. It was stipulated at the hearing (R. 197), as alleged in respondents' answer to the Information (R. 94) that the motion for the appointment of a receiver was never presented to the court. The last order of the court entered therein prior to the Information is found at p. 357 of the record. It is the only order of injunction made in the suit. The opinion on which it is based is printed at pp. 348-351. It concludes as follows: "It is beyond dispute from this record that this ordinance is unreasonable and unfair, wherefore it should be declared invalid, and an order to that effect may be entered." No proceedings were taken on the creditor's bill and none were ever intended. It was filed January 16, 1914; the answer day was February 5; on February 2 a stipulation was filed and order entered, "extending time for answer to first Monday in April" (R. 357), after the date on which the Schreiber Ordinance was to become effective. We understand that no receiver has ever been appointed and that the street railway continues to run with no other franchise than that granted by Judge Killits by his "temporary" injunction of September 12, 1914.

The contempt proceeding cannot be disassociated from, but must be considered in connection with the

proceedings in the Doherty case concerning which the contempt is charged to have been committed.

Far-Reaching Effect of the Decisions Below upon the Right of Public Discussion of Public Questions.

It has been the general understanding of publishers, and until this case was decided, it had been the consensus of opinion of courts and text writers that since the enactment of March 2, 1831, there was no such thing as "constructive" contempt of a federal court. Federal courts have administered the law in an orderly manner and without punishing for contempt actions not committed in their presence which did not really interfere with the administration of justice. Acts which did actually interfere, whether committed in the presence of the court or not, were properly punished. Disorders in court, interference with witnesses, assaults upon court officers, direct attempts to influence jurors, were all acts which actually interfered with the orderly procedure of the administration of justice, and were properly punished by summary process.

The trial court in the present case, however, has found the defendants guilty because the various articles and cartoons complained of tended to obstruct the administration of justice. This is clearly shown in the syllabus prepared by the trial court (R. 109, 110). The first syllabus declares that the constitutional guaranty of free speech and a free press does not apply to publications respecting a pending cause which tend

to obstruct the administration of justice therein. The third syllabus holds that no matter where the act is committed, the criterion of the power of the court to punish for contempt by summary process and conviction is "the nature of the act as **tending** directly to affect the administration of justice." The fourth syllabus declares that publications in a newspaper which are of a **nature** to embarass the judge or "which **tend** to appeal to prejudice against the court or against a party" may subject the publisher or the editor, or both, to summary process in contempt. The fifth syllabus holds that in order to procure a conviction it is not necessary that the publication ever came to the attention of the judge or that it had any influence on the consideration of the cause to which it refers, and that it is enough if the publication "is seen to **tend** to obstruct the administration of justice." The sixth syllabus declares that other publications may be considered in determining whether a publication "**tends** to obstruct the administration of justice."

The construction placed upon the Act of 1831 by the courts below not only removes all distinction as to the place in which the punishable act occurs, but enlarges the class of acts which may be summarily punished from those which do obstruct the administration of justice to those which, in the opinion of the judge, **tend** to obstruct the administration of justice. We cannot shut our eyes to the effect of the decision in stifling discussion in newspapers or on the rostrum of any question pending before a federal court when that dis-

cussion tends to embarrass the court or to disparage one of the parties to a pending cause.

Disparagement of a party. Controversies over public questions, involving the rights and obligations of public utility companies and the citizens of a community, generally reach a climax and result in litigation only after extended public discussion and criticism. The public utility company, with its concentration of purpose and trained forces, usually has an advantage over the citizens of a community in presenting its side of the case to the municipal authorities. The opposite side is often presented only through the efforts of public-spirited citizens and a part of the newspapers of the community. It thus happens that when questions regarding the interpretation of a franchise or the obligations of a public utility come before a federal court, there has been much discussion of the merits of the case and the attitude of the parties. An illustration of such a condition is found in the present case. From the opinion of the court, it appears that "the testimony shows that Toledo has had a street railway franchise problem confronting it for more than ten years and that agitation concerning it of the familiar extreme type had accompanied the attempt of every administration to deal with it and that it had figured as the issue in five or six municipal electoral contests." (R. 112). Defendant Cochran gives a detailed and graphic account of the agitation (R. 211 et seq.). The institution of the Doherty suit in the

District Court did not initiate public interest in, nor public discussion of, the street car situation.

If the trial court's interpretation of the Act of 1831, is to obtain as law in the United States, any public utility company which finds itself harassed by the demands of a city council supported by a newspaper and public speakers, can have one of its non-resident bondholders file a creditor's bill against the company, make the city a party and practically close any public discussion which tends to disparage the company or belittle its claims, even though the company is at the same time endeavoring to secure from members of council a franchise to which apparently a large part of the citizens object.

A reading of the record in this case shows that, with one or two exceptions, the improprieties found by the court in the various articles for publication of which conviction was had, consist in disparagement of the claims made by The Toledo Railways & Light Company or in disparagement of its officers or attorneys.

The completeness with which the discussion of public questions will be foreclosed if the trial court's decision becomes law in this country is well shown by the finding of guilty on account of the news article of March 24, 1914, and also because of the cartoon then printed entitled, "At the Last Ditch," and the language "With Henry L. Doherty directing operations, the Big Con got busy early Tuesday in its effort to evade the Schreiber 3-cent fare ordinance." (R. 106).

The cartoon appears opposite page 6 of the Record

and the news article at pp. 6 to 19; a part of the first page of the paper of March 24, 1914, is reproduced on page 369. The cartoon shows the apparently hopeless efforts of the legal and financial heads of the street railway system to keep from granting three-cent fares under the Schreiber ordinance. It carries no threat nor has it any tendency to stir up resistance to any orders which the court might possibly issue in the future. There is only a semi-humorous representation of the difficulties which the management of the street railway system were having in attempting to keep three-cent fares from coming to the people of the city. Under the principles laid down by the trial court, the publication of such a cartoon constitutes contempt of court and the publisher should be summarily punished. The statement, "With Henry L. Doherty directing operations, the Big Con got busy early Tuesday, etc." (R. 106), which appeared on the same day, was possible disparaging on account of the use of the nickname applied to The Toledo Railways & Light Company.

If the opinion of the trial court is to prevail, it will be unlawful for any newspaper to speak disparagingly of the actions, plans or methods of railroads, street car companies, gas companies, telephone companies, or any other public utility which either comes into a federal court voluntarily, as in this instance, or is brought into a federal court at the suit of a city or citizen. All adverse newspaper discussion of the demands made or service rendered by the public utility must disappear,

leaving it, as in this case, to continue its efforts to secure from the City Council a new charter upon its own terms unembarrassed by the restraining influence of public discussion and criticism reported in newspapers and supplemented by editorials.

Judge Pritchard, in commenting upon the publication by Josephus Daniels, criticising the appointment by a federal court of a receiver for a railroad, in Cuyler vs. Atlantic, etc., R. Co., 131 Fed. 95, said:

> "Public questions are generally settled in the right way and the fact that such is the case is due in a large measure to their free and untrammeled discussion by the press of the country."

Until these contempt proceedings were instituted there had been in the city of Toledo, free discussion of the franchise problem for many years. Defendants had fought against the grant of a franchise for over ten years, and the street railway company had published in rival newspapers, fifty or sixty full page advertisements or statements setting forth its position (R. 207). The city of Toledo was then, against its will, made party to a suit, the ostensible purpose of which was to enforce payment of a debt due from The Toledo Railways & Light Company to Henry L. Doherty, et al.; a suit which involved no federal question in so far as the city was concerned, and concerning which the District Judge said, in refusing the motion for a preliminary injunction (R. 303):

> "It is plain that if the demand is not pressed upon the court to appoint receivers, the pos-

session which it is claimed the court now has of the affairs of the company is a mere legal figment and that it cannot be maintained that such figurative possession is exclusive, if the situation is used merely for the purpose of pursuing reliefs asked for which are merely ancillary to the apparent primary ground of action, to which alone the courts power of possession may be referred."

It is now determined by judgments of the courts below that the institution of such suit terminates the right of further discussion of this public question, in so far as defendants are concerned. The right of plaintiffs in the Doherty suit and others whose views were opposed to those of defendants, to continue the discussion, was apparently not terminated by the institution of the suit. The trial Judge, for example, speaking from the bench, but "as a citizen" characterized the Schrieber ordinance as "mere buncombe" (R. 407). Whereas, Mr. Doherty and The Toledo Railways Company, between June 16 and July 7, 1914, continued to publish in rival newspapers, advertisements and statements dealing with the subject matter of the suit, disparaging their opponents, including the city officials who had enacted and those who were proposing to enforce the Schreiber ordinance and endeavoring to prejudge the outcome of the case (R. 382-402).

These published statements accused the officials of the city, that is, "those who have been chosen to make and carry out the laws," of being "lawless and dis-

orderly" (R. 383). In express terms they accuse the City Council of having "acted upon incorrect legal advice prompted by malice or due to incompetency or both" (R. 384). They state that "the city administration controls the police department," and strongly intimate that they will not enforce the law (R. 387). Concerning the city attorney, Mr. Doherty says in one advertisement:

> "Years ago I realized that if the postman stopped to fight it out with every yellow cur that barked at him, he would never have time to deliver his mail (R. 389)."

According to the judgment of the Court of Appeals it may be presumed that these advertisments were read "by the reading public, including the Judges . . . . cried and sold by the hundreds and thousands under the court house windows and brought into, if not sold in, the corridors and offices of the building."

Not only were these statements of Doherty and the railway company, fully as disparaging to parties to the suit, as any publication of defendants, but they also tended as much as did defendants' statements, to discredit in advance any order the court might make contrary to the street railway interests. If the publications of defendants were within the statute, it is equally clear that the publications of Doherty and the railroad company were within the statute. But we submit that interference with free and untrammeled discussion of a public problem, by both parties, is not imperatively required by the Act of 1831, and that in

view of the well recognized benefits to be secured by such public discussion, the statute should not be construed to prevent it.

Acts of a nature to embarass the court. The publication of many of the items for which the defendants were found guilty (R. 106) can be accounted misbehavior solely because they "are of a nature to embarass the judge of the court." The trial court in his opinion refers to these news items as showing a "consistently unfriendly attitude against the court" (R. 161). In the opinion, particular importance is laid upon the editorial paragraph of September 14, 1914, referring to the contempt proceedings against Quinlivan, who had denounced the action of the court at a labor meeting, which item read:

> "Would it be contempt to remark that it is a pecular situation where the officer who makes the charge also considers the evidence, renders the verdict and imposes the sentence?"

Of the contemptuous character of that paragraph the court says:

> "Its language, form of expression, typographical prominence—across two columns, in heavy black-face type—leave no room for doubt" (R. 163):

The comment of the editor upon the situation is different only in form from that of the court of appeals affirming the judgment, where it was said:

> "If there is no immediate urgency, and if no other reason exists making it specially appro-

> priate that the same judge act, we think it by far the better policy to call in another judge;" 237 Fed. 986, at 988.

It is obviously impossible for a newspaper publisher who is attempting to keep alive the interest of his readers in a street railway franchise fight, to tell with any degree of certainty what comment might be of "a nature to embarrass the court." Judges differ in their character and their dispositions. Some are more susceptible to adverse comment than others. The court of appeals affirming the convictions makes the problem for the publisher or editor still more difficult. Speaking of the effect of newspaper articles upon the mind of the trial court it says:

> "it is equally of no importance that in such a case the attempt may produce in the judge's mind irritation, instead of fear." 237 Fed. 986, at 991.

We are unwilling to believe that Congress, by the Act of 1831, intended to authorize federal judges to punish for contempt, newspaper publishers or public speakers who, through the newspapers or upon the public platform, made statements of such nature as to embarrass or irritate a federal judge before whom the questions under discussion were being litigated. Not only does the language of the Act repel any such conclusion, but the tendency in this country to encourage public interest in all public questions, including the conduct of all public officials, renders such an interpretation most undesirable.

Ex-President Taft, when a Circuit Judge of the United States, speaking before the American Bar Association in 1895, upon the subject "Recent Criticism of the Federal Judiciary" (the reference being to the Debs case and other proceedings in the federal courts in the Pullman strike), said:

> "The opportunity freely and publicly to criticise judicial action is of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny and candid criticism of their fellow men. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits and thus exert a strong influence to secure uniformity of decision. But non-professional criticism also is by no means without its uses, even if accompanied, as it often is, by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common sense, the protest of many average men may evidence a defect in a judicial conclusion

> though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just conclusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who cannot be reached and made to pause and deliberate by hostile public criticism. In the case of judges having life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve."

Acts tending to excite resistance to an order of the court. The Court of Appeals held that the finding of the District Court that the publications of defendants "tended and were intended to provoke public resistance to an injunctional order," if one should be made, "was supported by competent evidence." (R. 417). At R. 418 the court said of the publications:

> "They were, in form and substance, well adapted to bring about resistance to and utter public disregard of an injunctional order."

The court conceded that the record showed that when the order was finally made "no riotous disobe-

dience followed," but held under the statute, not only acts actually obstructing the administration of justice, but acts tending to obstruct the administration of justice were punishable. The trial court lays particular stress upon the publications of the 24th, 25th and 26th of March, just preceding the 27th of March on midnight of which day the three cent ordinance was, according to its terms, to go into effect. The Toledo News Bee on those three days printed all aspects of the franchise controversy, and a complete history of the entire street car situation as it then stood, in the city hall, in the federal court, in the council chamber, in the city solicitor's office, and at labor headquarters. (R. 369, 370, 371). On March 27, the News Bee carried a line across the entire top of its first page as follows; "Be Peaceful is Plea of Leaders to Car Riders." The headline of the leading article, four columns wide, was; "All Urge Peace in The Car Contest; People are Asked to Rely on Courts. City Officials and Heads of the Municipal Ownership League Urge No Violence." (Plaintiffs Exhibits No. 3, R. 372). The trial court relied much upon the "cumulative effect" of the various articles complained of throughout the Spring and Summer of 1914; yet in determining the effect of the publications of March 24, 25 and 26, the court ignored the effect of the associated publication of March 27. There can be no speculation as to what the actual effect, if any of the publications on those four days was. There was no rioting, there was no disorder, there was no trouble of any kind, but defendants are found guilty

because of the supposed tendency of the first three articles to incite disobedience to future orders of the court.

So far as concerns the particular charge of inciting disobedience to an order of the court which might be made in future, the fact that the incitement was by newspaper publication can have no bearing on the decision of the question whether the act was in the presence of the court or so near thereto as to obstruct the administration of justice. The alleged inciting articles were written out of the presence of the court, and the persons to be incited, were to disobey the order of the court, if they should disobey it, away from the court. So that the incitement to disregard the court's order, stands on the same ground as if it were made orally in a speech away from the presence of the court. Such incitement is not the misbehavior in court or near thereto that the statute deals with.

The word "Misbehavior" generally, and especially, as used in the Act of 1831 as part of the clause, "Misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," connotes action or deportment in respect to the presence of another, and implies such presence. It does not signify a wrong done another openly, or secretly in the absence of such other. The Century Dictionary says; "Behavior is the general expression of one's mode of acting; it also refers particularly to conspicuous actions and conduct;" and "Misbehavior; Improper, rude or uncivil behavior."

The actual resistance or obstruction to the execution of any writ or order of the court, committed out of the presence of the court is punishable by indictment under section 2 of the Act of 1831, carried into the Penal Laws of March 4, 1909 as section 140. (35 Stat. 1114). Section 332 of the Penal Laws (35 Stat. 1152) provides:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

In Hillmon vs. Mutual Life Insurance Co., 79 Fed. 749, while certain insurance companies were defending an action on a death loss, the Superintendent of Insurance of the State of Kansas wrote a letter to the companies accusing them of unfair tactics in the suit and advising that a license would not be granted them to do business in the state thereafter. An order to show cause was issued against the Insurance Superintendant, who moved the court to dismiss same on the ground that it had no jurisdiction to proceed summarily against him for contempt. The District Judge dismissed the order after referring to sections 1 and 2 of the Act of 1831 as then embodied in sections 725 and 5399 of the Revised Statutes respectively. The District Judge strongly criticised the action of the Commissioner in arrogating to himself the summary determination of questions pending in the suit, and said:

> "Any attempt, by threats or intimidation or duress, on the part of the respondent to coerce

> or deter the companies from making their defense in court, tends to obstruct and impede the due administration of justice, and is a proper matter to be presented to the Grand Jury. It would, however, be a strained construction to hold that the act was done in the presence of the court, or so near thereto as to obstruct the administration of justice. 130 U. S. 267, 9 Sup. Ct. 699; 19 Wall. 505; In re Brule, 71 Fed. 946; Sharon vs. Hill, 24 Fed. 726."

United States vs. Carroll, 147 Fed. 947 (1906) was a summary proceeding in contempt before District Judge Wolverton against Carroll who had asked one Hopkins on the street to do something for him or his brother with the jury. Hopkins did not approach the jury, nor promise Carroll to do so. In dismissing the proceeding Judge Wolverton said (p. 954) that "the endeavor of Carroll made with Hopkins to have him use his influence with the jury, for the purpose indicated, did not constitute a contempt punishable under section 725, Rev. St., which defines and limits the power of the court in the premises," that "it was an endeavor which in no way reached or influenced the jury, and, therefore, tended in no way to impede justice or the administration thereof." The court said: "The act was wilful, is vicious and reprehensible, and should be visited with appropriate punishment, but the court is unauthorized to mete it out in this proceeding."

Publishers of influential newspapers in this country are necessarily interested in the preservation of law and order in the communities in which their proper-

ties are located. From 1831 until 1914, the publishers worked side by side with the judges of the federal courts in the decision and discussion of public problems. The discussion of such problems naturally and of right is a part of the domain of the public press, no less than of the courts. It has never been considered that the incidental injection of a public question into a law suit primarily instituted for the determination of a private right, automatically excluded the press from further activity in that domain. Newspapers have criticised the Federal courts, as in the Debs case, and the claims and acts of litigants before the courts, but the necessity of enforcing the doctrine of constructive contempt against newspapers or public speakers never became apparent until these defendants were convicted.

The power to punish for constructive contempt of court in such a case is not only unnecessary to the orderly procedure of the Federal courts, but its exercise after more than eighty years of disuse, will tend to create a distrust of the judiciary, on the part of newspapers and their readers, and give to unscrupulous critics of the courts a credit and standing which they would not otherwise have. Referring to the suppression of free public discussion the Areopagitica says:

> "Instead of suppressing sects and schisms, it raises them and invests them with a reputation: 'The punishing of wits enhances their authority,' saith the Viscount St. Albans, 'and a forbidden writing is thought to be a certain spark

of truth that flies up in the faces of them who seek to tread it out.' "

The Supreme Court of Minnesota in In re Hart, 140 Minn. 88, quotes with approval the language of District Judge Jones in Ex parte McLeod, 120 Fed. 130, 136;

> "Such criticism is the right of the citizen and essential not only to the proper administration of justice, but to the public tranquillity and contentment. Withdrawing the power from courts to summarily interfere with such exercise of the right of the press and freedom of speech deprives them of no useful power."

The Court of Appeals erred in holding that it was immaterial whether the record showed error as to the second and third counts.

The Court of Appeals relied upon Claassen vs. United States, 142 U. S., 140, which is generally cited to support the rule "that if there is any one count to support the verdict it shall stand good notwithstanding all the rest are bad," gives the reason of the rule and suggests the exceptions. Mr. Justice Gray in delivering the opinion, said, at p. 146:—

> "A general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

In Gompers vs. Buck Stove & Range Company, 221 U. S. 440, Mr. Justice Lamar, after pointing out that the rule originated in cases where the finding was by the jury, while the sentence was by the judge, said:

> "In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction.
>
> "But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independents acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."

The Court of Appeals says in its opinion that "the sentences imposed are amply supported by conviction under the first count, and whether the record shows

any error as as to the second and third counts becomes immaterial."

The sentences were imposed upon definite and separate findings as to each of the three counts, specifying the publications in each count that were held to be in contempt and the particulars in which each publication was found to be contemptuous (R. 105-108). Demurrers to each count, and motions in arrest of judgment on each count were overruled (R. 80, 81, 183, 184). The assignments of error were specific and separate (R. 186).

The publications on account of which defendants were found guilty under the second count are set forth in specifications 2 and 3 (R. 74, 75). It seems clear that neither publication was a contempt. The charge in specification 2 is that the announcement that Judge Killits would hear the Quinlivan case "was untrue, as defendant well knew, and a misrepresentation of the facts, in that said Judge had not then at any time announced or stated that he would hear said case or proceeding against said Quinlivan." (R. 74).

The testimony of Ross, a reporter on the News Bee (R. 210), that Judge Killits told him over the telephone that he would hear the Quinlivan case himself is not contradicted. But if the reporter was mistaken, the published statement that Judge Killits would hear the Quinlivan contempt proceeding, would not obstruct or tend to obstruct the administration of justice, nor sub-

ject the Toledo Newspaper Company or Cochran, its editor, to summary punishment.

The court did not find the defendants guilty on specification 1 of the second count (R. 73).

The specification on which the defendants were found guilty under the third count is found at p. 78 of the record reproduced at p. 379. It is the editorial entitled "The News Bee and Judge Killits." The finding of the court (R. 108) that the publication was "in the first edition of the Toledo News Bee of September 14, 1914" is inadvertent but immaterial. There is no testimony to contradict the allegation in the Information (R. 78), admitted in the answer (R. 103), that the publication was on September 17, 1914.

The charge in the Information is that "said article tended and by said defendants was intended to belittle and ridicule said court and said judge thereof with reference to said proceeding then pending against said Harry J. Howard (R. 79)." The conclusion of the pleader and the finding of the court that "said publication constituted misbehavior on the part of said defendants so near the presence of said court as to obstruct the administration of justice with reference to said proceedings in contempt against said Harry J. Howard" is not warranted.

We respectfully submit that the District Court erred in finding defendants guilty and awarding punishment for the publications set forth in the third count and in specifications two and three of the second count,

and that it was not within the province of the Court of Appeals to ignore the errors because in its opinion "the sentences imposed are amply supported by conviction under the first count."

The Court of Appeals erred (1) in holding that facts which were not alleged in the Information might be presumed in support of the judgment and (2) that facts which were not proved by evidence might be presumed in support of the judgment.

The extent to which the Court of Appeals felt itself authorized, in a proceeding criminal in nature and involving the liberty of the defendant, "to presume in support of the judgment" facts not alleged nor proved is shown in its opinion (R. 418). The allegations supplied and the facts assumed were that the judge currently read the publications and that they were sold and distributed in the court house corridors. It should be added that the Court of Appeals did not decide whether the facts were material.

We respectfully submit that the judgments of the District Court and the Court of Appeals should be reversed and the Information quashed.

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ANALYSIS OF THE CHARGES AND OF THE COURTS FINDINGS.

First Count.

Specification 1 (R. 5-19); news article of March 24, 1914, headed "Big con fights three-cent fares in federal court; may ask injunction against the Schreiber Ordinance;" first page reproduced typographically (R. 369). Cartoon "At the last ditch" (R. 6).

The charge in the Information (R. 6) is that said matters "tended and by said defendants was intended in connection with said headlines to convey to the public and give the public to understand that the city soliciter of said city would protect any person who might refuse to pay more than a three cent fare on said street car system notwithstanding any order, finding or holding which said court might enter or make in said suit." (R. 6).

The finding of guilty on account of this publication is (Finding 1, R. 106)—

> "because of the emphasis therein by unnecessary repetitions in headline and elsewhere given to the alleged assurance of official protection to car riders who would insist on the terms of the so-called Schreiber Ordinance in advance of court action in the Doherty case."

On March 24, 1914, as shown by the newspaper of that day, there was news from many sources regarding the street car situation. It looked as though the ten year struggle was approaching a climax and that a

decision must be rendered for or against three cent fares. The night before, the city council at a public hearing, which was fully and fairly reported, had rejected the request of the street railway company that the operation of the three cent fare ordinance be deferred and had given the council committee sixty more days to receive franchise proposals. On March 24, Doherty & Company filed in their suit, which had been pending since January 16, a motion for an injunction to restrain the enforcement of the Schreiber Ordinance, and a motion to make the city a party to the suit. The city had been ordered made a party by the clerk of the court reading the motion to Judge Killits who was in Cleveland, and who over the telephone granted the motion.

The city solicitor stated that he would "protect any person put off a car because of his refusal to pay more than three cent fare" (R. 9). The trial judge held that because this statement was emphasized in the paper by what he calls "unnecessary repetitions" defendants were guilty of contempt. The innuendo laid in the Information is that they intended to say that the city solicitor would protect persons who refused to pay more than three cents "notwithstanding any order, finding or holding which said court might enter or make in said suit." On its face the newspaper of March 24, carried no such suggestion and there was no testimony of any of the thousands of readers that they so understood it. Defendant Cochran testifies without contradiction, direct or inferential, at R. 215:

> "But there wasn't intention then, nor at any time, by any policy that I directed, to convey to the public and give the public to understand that the city solicitor would protect any person who might refuse to pay more than three cents fare on the street railway system, notwithstanding any finding or holding that this court might enter in the pending cause. As a matter of fact, we did not have it in mind and weren't thinking about any possible violence because of a disobedience of the court's order."

While the court held defendants guilty under the specification, the specific finding of the court was not responsive to the specification. The finding of the court was that defendants were guilty because of the emphasis that their publications gave to "the alleged assurance" (in fact it was a real assurance) of protection to car riders relying upon the ordinance "in advance of court action in the Doherty case," whereas the specification charged that the publications encouraged violations of an order of court after it should have been made.

The obvious and only fair interpretation that can be placed upon the newspaper articles is that they advised the public that the city solicitor would endeavor to sustain in court, presumably in the state court, the legality of the ordinance, which was true. The city solicitor was never given an opportunity to protect an ejected car rider, and test the ordinance in the state or in the federal court, because the street car company did

not accept the challenge of a test case by ejecting a passenger.

Specifications 2 and 3 (R. 19-25); news article in paper of March 25, 1914, headed "Car Riders may ignore order barring low fare;" first page reproduced typographically (R. 370); cartoon "A desperate case," with expression "Guess we'd better call in Doc Killits" (R. 20); and (Specification 3, R. 22) editorial in same issue entitled "Municipal ownership the only way to street railway peace" (R. 377).

The charge in the Information (R. 19) is that said headline was intended "to convey to said court and the public that citizens of said city riding on the cars of said street car system would ignore and refuse to comply with any order that said court might make in said suit restraining or enjoining the enforcement of said Schreiber ordinance;" and that defendants intended by "said cartoon to convey the impression that the existence and life of said street car company was in danger and could only be saved by the powers of said court presided over by said the Honorable John M. Killits." The court (R. 106) found defendants guilty for the publication of this issue, "both as to its reflection on and denunciation of the suitors in the said cause" and "as to its reflection on the judge of this court with reference to said cause."

On March 24 the court had made the city of Toledo a party to the suit and plaintiffs and the street railway company had asked for on injunction to restrain the city from enforcing the Schreiber ordinance. Defend-

ants on March 25 reported the plans of counsel for the street railway company, the plans of the municipal ownership league, of the central labor union, and of the street railway franchise committee of the city council. The statement in the leading news article that a mass meeting of the municipal ownership league was to be held on Friday night and that it was planned that those attending should ride on the street cars and refuse to pay more than three cent fare, is not suggested to have been untrue. A grandiloquent statement of councilman Mulholland who was to preside at the meeting was also published; which no doubt every reader of the statement looked upon as a jest rather than an assault upon the authority of the federal judiciary.

The cartoon entitled "A desperate case" is based upon the failure of the representatives of the street railway company at the meeting of the city council on the preceding Monday to procure postponement of the enforcement of the Schreiber ordinance, and referred to the action of the company's attorneys in applying to the federal court for an injunction. If it be true that this cartoon derides plaintiffs in the case as stated by the court in its opinion (R. 163), it does so in a good-natured way and represents the exact situation.

The editorial of March 25 is made the basis of a finding of guilty in that it derides parties to the case and also reflects upon the judge. The situation which confronted the editor at the time this editorial was written was as follows. A new and inexperienced young man had been recently elected city

solicitor. On the previous day the street railway company had filed its pleadings and motions to make the city a party defendant in the federal court. The voluminous and complicated pleadings appear at R. 232-358. Doherty & Company, which since the spring of 1913 had been operating the railway company (R. 4), prayed the appointment of a receiver for that company, who should be directed to report to the court any contracts which the company had entered into for repairing, rebuilding or improving its railway or furnishing equipment for rolling stock therefor, and prayed that the receiver should be directed to cancel such contracts (R. 244). It appeared to the editor that this was but a colorable device instituted for the sole purpose of conferring upon the federal court jurisdiction over the dispute between the railway company and the city of Toledo, both corporations being citizens of the state of Ohio, over which the federal court would have no jurisdiction in a controversy between them. The answer of the street railway company filed March 24, alleged (R. 265, paragraph 12), that it would not be necessary to appoint a receiver if the court would grant an order restraining the city "from asserting, enforcing or attempting to enforce said ordinance." The prayer for the appointment of a receiver was manifestly an artifice. The motion for appointment of a receiver was never presented to the court (R. 187). The editor had seen the judge order the city made a party in the suit, over the telephone, without apparent hesitation or investigation, and without notifying the inexperienced

city solicitor of the pendency of the motion. It seemed to the editor, and was apparent, that the street railway company was more ably represented before the Federal Court than the city and citizens of Toledo. Under these circumstances the editor called upon the city solicitor to employ counsel of experience and ability. The editorial contains no intimation of corruption or prejudice on the part of the court, but merely an emphatic assertion of the human limitations of the judge and the consequent need of experienced counsel to assist the city solicitor. The fact that such assistance was necessary, is fully demonstrated by the colloquy between the court and the city solicitor at the hearing on September 9, 1914 (R. 402-405).

The same issue of the paper recited the fact that the clerk of court "called Judge Killits, who is holding court in Cleveland, on the phone. The clerk read the motion (to make the city a party) to the Judge who granted it." Commenting on this the editor said; "Holding court over the telephone is a new one but it seems to be a highly satisfactory method of doing business" (R. 25). The statement was true. If there was impropriety in making the order over the telephone the Judge had only himself to blame; if there was none, he should not object to the public being advised of his action.

Specification 4 (R. 25-32); news article of March 26 (R. 371); headed, "Killits' upsets low fare order."

The charge of the specification (R. 25) is that the statement was "wholly untrue in so far as it attempts

to convey, as defendants did so attempt, the impression that said judge of this court had issued any order at all in said cause, etc." The court found defendants guilty for the publication of this article and the four paragraphs covered by **specification 5**, which appeared in the same issue of the paper.

The editor and reporters read the statement issued by Judge Killits to the people of Toledo and furnished to each of the four newspapers in that city and which appeared in full in The News-Bee of March 26 (R. 28-31), and to these laymen the statement that the court had studied the questions involved in the case and had arrived at certain definite conclusions, amounted to an announcement that the court would enjoin enforcement of the ordinance in accordance with the prayer of the street railway company. The court, in its statement to the public, said:

> "The Supreme Court of the United States in the Detroit and Cleveland cases, in which facts legally similar to those involved were passed upon, leaves this court no power to deny the company injunctional relief until we know that it is not asked to carry an unconscionable burden" (R. 30).

And:

> "It follows that no right exists anywhere to compel the company to run its cars upon any terms as to rate of fare or other conditions which are merely arbitrarily ordained, until it is decided that such arbitrary conditions are reasonable" (R. 29).

The editor did not intend to say, as charged in the Information, that the judge had entered a formal order: he printed the statement of the court in full and in the headlines set out what he believed to be, and what was, the effect of the court's conclusion.

Specification 5 (R. 32); four short editorial paragraphs in the issue of March 26, 1914. The charge in the Information is that "they intended to convey that, notwithstanding any order which said court might make, or enter in said proceedings on said day, it would not be regarded by the people of said city as law, unless said people should approve the same," etc. (R. 33). These paragraphs are referred to in the opinion at R. 119. The judge says "They poke fun in a familiar way at persons prominently connected with the case;" that they display "bad judgment" (R. 159); which may be admitted. In accordance with the dictum of former Mayor Sam Jones, they suggest that the people will reserve their own opinion as to what kind of an order in the case is good law; but there is no suggestion, or encouragement, to the public to disregard an order in the case, even though they should consider it bad law.

Specification 6, (R. 33-44); News Bee of March 27, 1914; first page typographically reproduced R. 372; cartoon entitled "As we lose Kapp to get Lapp" (opp. R. 34); also editorial, part only of which is given in the specification, printed in full at R. 97. The headings of the news articles complained of are: "All urge peace in car contest;" "People are asked to rely on

courts;" "Inflammatory speeches to be frowned on at Memorial Hall meeting" and "Mayor will be among first to test question." Defendants were not found guilty for publishing the articles so headed, but were found guilty (R. 107) of publishing the cartoon and the editorial.

In his public statement of the day before the judge had said; "The good sense of the community surely will not tolerate disorder. If this hope is shown to be baseless, we will put the operation of cars in the hands of the marshal of this court for a few days" (R. 31). Marshal Lapp, at Cleveland, stated; "I am going to Toledo on Friday night to look over the situation. There must be peace and quiet. The orders of the U. S. Court must be obeyed," and the judge in sending the marshal to Toledo is quoted without contradiction as having said; "We cannot afford to have any rioting in Toledo. It would be the worst thing that could happen to the prosperity of the town" (R. 27). Complaint is made that the inscription on the marshal's valise was intended to convey the impression that the marshal was hastening to Toledo "with an order of this court pertaining to the motion aforesaid, although in fact no order of any kind had been issued by the court in the premises" (R. 34). Laymen who publish newspapers and who read newspapers make but little distinction in the use of the words "order" and "instructions." The trial court issued instructions to the marshal. The cartoonist instead of saying, "Instructions from Judge Killits" chose the shorter word, so

that the inscription read, "Order from Judge Killits." It was true that no formal order had been entered in the Doherty case by which the marshal was directed to take action at Toledo. Instructions, however, had been given him and the cartoon to one who is not a lawyer, correctly represents that situation.

The court will bear in mind that at this time the officials of the street railway company were still working for a franchise before the city council, and we suggest that the court's ruling forbidding disparagement of a public utility when it becomes a party to litigation in a pending case, would have precluded all news or comment regarding the claims of the street railway company as to rates of fare or other terms of the proposed franchise. In the latter part of this specification defendants are charged on account of the editorial entitled, "The big con's attitude is the same old defiance of the people," and an excerpt from that editorial is quoted (R. 44). We have reprinted the entire editorial (R. 380) in order that the court may see that the editorial was directed to the application of the company for a franchise.

The paragraph particularly complained of is; "It (meaning the street car company) is now a trespasser on many streets of Toledo and will be on practically all of them by tomorrow morning. It has now rushed into federal court to try to take from the hands of the people of Toledo the right to control their own streets and to make terms under which the big con may use these streets." The charge is that the editorial in-

tended to convey the impression that the court would not protect the city in its right to control the streets but would surrender the streets to the street car company. We are at a loss to see how any such innuendo can be attached to this editorial. In the first place the court misquotes the paragraph by leaving out the significant words, "to try," and makes it read (R. 107), "has now rushed into federal court to take from the people of Toledo the right to control their own streets." In fact the editorial did not reflect on the court at all. It appeared under another editorial entitled, "How Toledo could do better than Cleveland in fares and rates" (R. 380), advocating municipal ownership, and was itself directed to that issue. Its recommendation was that the city officials should no longer negotiate with the street car company in the franchise proposals pending before the city council, but should acqui , the properties and operate them for the city.

Specification 7: News-Bee of March 28 (R. 44); refers to no item upon which the court finds the defendants specifically guilty. The Information charges an offense for the publication of what actually took place at the time the Schreiber Ordinance went into effect. The mayor and other citizens boarded the cars and tendered the three-cent fare in accordance with the terms of the ordinance. The conductors would not accept the three-cent fare and passengers were carried free. This continued until the trial court took over the operation of the property and fixed the rates of fare.

Specification 8 and 9; News-Bee of March 30 and March 31 (R. 45, 48); in which are reported the situation regarding the street car controversy and the claims of the city officials and the officers of the street railway company as presented in court or to the public. No specific finding of guilty is made upon any of the matter contained in these two specifications.

Specification 10; News-Bee of August 14 (R. 55): finding 5 (R. 107). Complaint is made of the head line, "Killits puts burden on city," as "intended to and does convey the impression that the court had placed upon said city of Toledo the burden of sustaining the reasonableness of its own legislation, namely, such Schreiber Ordinance; whereas in fact all that said court had theretofore done in the premises as was well known to said defendants, was to direct said city to meet in behalf of said Schreiber Ordinance, the evidence which, on said August 14, 1914, had been introduced in behalf of said motions representing that said Schreiber Ordinance was unreasonable and confiscatory in its terms" (R. 55).

On August 14, the judge had partially heard the motion to enjoin enforcement of the ordinance and in adjourning the cause to September 8, had said; "On September 8, I will expect the city to be prepared to meet testimony that has been given; that of Carl Nau, accountant, which tends to show that the ordinance is inoperative" (R. 56). If a lawyer had been writing the headline and had had sufficient space, he probably would have said, "Judge Killits puts burden of going

ahead with the evidence upon the city." The layman editor found the effect of the court's ruling to be that the burden was then upon the city, and the headline was to that effect and was literally true. It is consistent with the matter contained in the report and does not indicate that Judge Killits had originally, erroneously or otherwise, placed the burden of proof on the city, although the judge, in his public statement to the citizens of Toledo on March 26 (R. 28-29), clearly said that he could not deny the company injunctional relief until "we know that it is not asked to carry an unconscionable burden."

Specification 11; (R. 58); News-Bee of September 5, contains a short paragraph of a supposed jocose nature, of no particular significance. It reads: "If Judge Killits should be held in Canada while Henry L. Doherty is marooned in Wall St., what would we ever do? Still, Peter Parker is always willing to give us good advice." Defendants were found guilty (R. 107).

Specification 12. (R. 58); News Bee of September 6, headed "Socialists call Big Con trespasser." The charge in the information (R. 58) is that because of the publication of previous articles and cartoons by defendants, and "said misrepresentations as to what this court had done, much hostile feeling had been developed toward this court with respect to said cause, and especially among the membership of a certain organization of the citizens of Toledo, namely, the local organization of socialists in said city, etc." The specification then proceeds to charge in effect that the news-

paper had stirred up and inspired a socialistic meeting on September 6, at which the court was condemned for its "alleged usurpation of power," and that in its issue of September 9, the paper had published an account of the proceedings at the meeting.

The court found defendants guilty (R. 107, Finding 7), of publishing, without, however, undertaking to say that the charges of the specification were true. It is not suggested that the report as published was untrue. In respect to this publication Harry J. Howard, managing editor testified at R. 205:

> "We published only a part of the socialists' resolution in the article of September 6, 1914, under the heading 'Socialists Call Big Con Trespasser.' We left out what I felt was rather a drastic criticism of Judge Killits."

What the paper published was only a familiar expression of socialistic disapproval of judicial interference with popular legislation, set forth in general terms, and without specific reference to the Judge. If defendants were guilty for publishing the account, then all who participated in the meeting and voted for the resolution, or told their friends what had taken place at the meeting, were equally guilty of contempt.

Specification 13 (R. 59-65); News Bee of September 10, 1914; news article under heading "Low fares banned by U. S. Judge;" "Killits practically knocks out Schreiber ordinance" (R. 59).

The charge in the specification is that while the court was considering whether or not it was authorized

to issue any order on the motion to enjoin the Schreiber ordinance, but without having reached a decision, said articles were published "intending to convey the impression that said court had decided said motions against said city and said Schreiber ordinance, although in fact and in truth said court had issued no order whatever in the premises, and had not reached a conclusion as to its duty therein."

Defendants were found guilty on account of the use of the first head-line above quoted (R. 107, Finding 8).

The head-line referred to what was said from the bench by the judge on the preceding day, September 9. A stenographic report of what occurred at the hearing appears at R. 402-407. From the bench, the court said in reference to the Schreiber ordinance (R. 63):

> "In this case we find that the City of Toledo and its officers, in passing the ordinance, had the same information and the same advice that this court has now and that the ordinance is confiscatory and inoperative. The conclusion is almost compelling to say that the ordinance was buncombe when passed."

It was at this hearing that the city solicitor so clearly showed his need of associate counsel in presenting the city's case (R. 402-407).

We submit that the innuendo sought to be drawn from the head-lines is unjustified. The court found defendants guilty of publishing "Low fares banned by U. S. Judge" without making reference to the balance of the head-lines "Killits Practically Knocks Out

Schreiber Ordinance." The head-lines did not convey the impression that the court had finally decided the case by formal order, but summed up fairly and exactly the conclusions of the court as announced from the bench. We suggest, that if a nisi prius judge considers it undesirable to have his tentative conclusions publicly announced, that he may easily prevent such announcement, by reserving public expression of his conclusions until they are embodied in a formal order.

Specification 14 (R. 65-67); News Bee of September 11; news article headed "Judge Killits is criticized in Central Labor Union meeting." The charge of the information (R. 65) was that, at a meeting on September 10 of the delegates from various labor unions of the city, the anticipated action of the court in the Doherty suit was made the subject of severe criticism by one John Quinlivan and impeachment of the judge was demanded in case he should decide the issues in favor of the street car company. The publication as set forth in the information contains a short but complete, and in so far as the record shows, true, account of the several items of business transacted by the delegates at the meeting. The fact was reported that Quinlivan and other speakers stated their expectation that Judge Killits would declare the Schreiber ordinance of no force, and that they "spoke in resentment of what they believed to be the court's attitude." This particular article as printed in the information does not report the fact that the inpeachment of the judge had been demanded at the meeting.

On September 11 the court issued an attachment in contempt against Quinlivan, the hearing on which on September 12, 1914 was continued until September 16, and on September 16 was continued until September 21, and on September 21 was "continued until after case of United States vs. Toledo Newspaper Co." (Docket Entries, R. 361).

Specification 15 (R. 67-71); News Bee of September 12, 1914; news article headed "Killits accuses John Quinlivan of contempt."

The finding of the court of guilty in respect to this publication was (R. 107, Finding 10):

> "With reference to the manner in which the alleged remarks of said Quinlivan concerning the court were printed in a so-called 'boxing' and given thereby special prominence under the heading: 'Basis of Charges Against Union Leader.' "

There is no suggestion that what the newspaper published as the "remarks alleged to have been made by J. Quinlivan, and on which Judge Killits bases his contempt charges" were not in fact correctly quoted as the basis of the contempt proceedings then pending. Nor is there any evidence to support the innuendo that said publication was "**under the guise** of printing a news account of said attachment of said Quinlivan."

As bearing upon the construction of the statute adopted in this case it is interesting to note that the information against Quinlivan was based upon the theory that his remarks at the labor union meeting

were considered as "liable to obstruct the due administration of justice." It is clear that the court considered that the statute authorized summary proceedings against Quinlivan because of misbehavior so near the presence of the court as to obstruct the administration of justice, within the meaning of the statute.

Second and Third Counts.

These counts and the several specifications thereof have already been referred to in our brief, pages 72 and 83.

In addition to what is said there we refer to the circumstances surrounding the publication of the editorial entitled "The News Bee and Judge Killits," complained of in the third count (R. 76), typographically reproduced at R. 379 and made the subject of a specific finding of guilty at R. 108. This editorial the trial court refers to in his opinion as defendant's "declaration of independence" (R. 164). The editor's subordinate, Mr. Howard, had been arrested and cited before the judge for contempt for printing the fact of Quinlivan's arrest and commenting adversely upon the announced purpose of the judge to hear that case himself. The judge "as a citizen" had discussed and criticized the purposes and motives of the city officials (R. 63). He had issued public statements through the newspaper to the people (R. 27, 28, 199), explaining his position and intentions in respect to the Doherty case. He had by so doing laid aside his exclusively judicial character and entirely apart from the perfor-

mance of his duties on the bench, had thrown himself into a contest involving an important public matter, in opposition to the stand which the editor of the News Bee had consistently maintained for many years. For commenting adversely upon the announced purpose of the trial court to hear the Quinlivan contempt case himself, the editor's subordinate, Howard, was threatened with imprisonment on a charge of unlawfully attempting to influence the court and obstruct the administration of justice. Possibly at this juncture, when Mr. Cochran published his "declaration of independence," he may have lost sight of the exclusively judicial character of the trial court's contempt proceeding against his associate and saw the judge divested of hierarchal attributes; but it is perfectly evident that the editorial could not have obstructed the administration of justice in the Howard contempt case nor have provoked any resistance to the enforcement of an order to be made in that case. Following the publication of this editorial the proceedings against Howard were dropped and the present proceedings instituted against Cochran and the News Bee.

Innuendos and Unitary Course of Conduct.

The court made "separate findings of fact adjudging respondents guilty on all three counts and for the publications of March 24, 25, 26, 27, and August 14, September 5, 9, 10, 11, 12, 14 and 17" (Opinion, R. 176). The court said at R. 84:

> "It is readily seen that a very large part of most of the articles set up in the Information is

> entirely free from possible criticism. • • • Some of the publications which, if in any instance they stood alone would readily be negligible, become offensive as part of a series, etc."

In finding defendants guilty the court said at R. 105:

> "Said publications considered in their aggregate and cumulative effect and as they tended to affect the consideration to be given to each other individually, considered as a series of publications, constituted misbehavior with respect to said pending cause so near the court as to obstruct the administration of justice, etc."

In addition to considering the publications cumulatively, it is apparent that the court also arrived at its conclusion of defendants' guilt, by making extensive use of the doctrine of innuendo, as set forth in the information.

This is not a case like Ex parte Terry, 128 U. S. 289, where the conclusions of fact of the trial court were accepted as against contradictory evidence, because the offense was in the face of the court and "the judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation or mitigation" (128 U. S. 312). The trial judge did not see nor hear anything except what is in the record; he took no judicial notice of any facts not before this court. Therefore the question whether the innuendos drawn from the publications were warranted, is before this court. Odgers on Slander and Libel, page 100 says:

> "It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words; to show how they came to have that defamatory meaning; and also to show how they relate to the plaintiff whenever that is not clear on the face of them. But an innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. If the words are incapable of the meaning ascribed to then by the innuendo, and are prima facie not actionable, the declaration will be held bad on demurrer, or if there be no demurrer, the judge at the trial will stop the case."

Newell on Slander and Libel, 2nd Ed., 619 and 620, says:

> "The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. 'An innuendo helps nothing unless the words to which it applied have a **violent presumption** of the innuendo.' "

In Lanston Monotype Machine Co. vs. Mergenthaler Linotype Co., et al., 147 Fed., 871 (1906), at page 872 the Court says:

> "It is contended that the alleged libelous matter was not published concerning the plaintiff or its business. The complaint says that it was so published, but if, after examination, the court can say that it would not convey any such

idea to the intelligent reader, then the complaint is insufficient, and it cannot be helped out by innuendos which do not serve to interpret the idea which would naturally reach the mind of such intelligent reader. In other words, the demurrer does not admit the truth of unintelligent innuendos. The innuendo in no sense enlarges or expands the matter which appears in the rest of the complaint."

In Pollard vs. Lyon, 91 U. S., 225, Mr. Justice Clifford, delivering the opinion said at p. 233:

"Courts affix to words alleged as slanderous their ordinary meaning; consequently, says Shaw, C. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. Alexander vs. Angle, 1 Crompt. & Jer. 143; Goldstein vs. Foss, 2 Younge & Jer. 146; Carter vs. Andrews, 16 Pick., 5; Beardsley vs. Tappan, 2 Blatch. 588.

"Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain

imputation, not merely of some indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. Gosling vs. Morgan, 32 Penn. St., 275; Shafter vs. Kinster, 1 Binn. 537; McClurg vs. Ross, 5 Id., 218; Andres vs. Koppenheafer, 3 S. & R. 255."

That a series of publications on the same subject, may have a cumulative effect, entirely different from that of a single or several publications considered separately, may be conceded. But that cannot be true in the present case considering the application of the statute to the case, because the cumulative effect of all the publications was nil; that is to say, there was no obstruction to the administration of justice. Defendants were not found guilty because their publications, either singly or cumulatively, obstructed the administration of justice. The administration of justice in the case proceeded in the same orderly manner, step by step, along with the issuance of defendants' publications, and attained the same results in so far as the record discloses, as it would have if the newspaper had never existed. Defendants were found guilty because the publications **tended**, in the opinion of the judge, to

obstruct the administration of justice. The tendency of publications to obstruct the administration of justice where there is no obstruction in fact is a test so elusive in nature, so dependent upon the uncontrolled whim of the judge, that a conviction based thereon, may as well arise from a single, as from a series of publications. Therefore, as the result of the whole series never attained the effect of actually obstructing justice, but rose no higher than a tendency to obstruct justice in the case, it does not assist any to point out the obvious fact that several publications considered together, may take on a different meaning and tend toward a different result, than they would considered separately, if it were possible to so consider them.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE TOLEDO NEWSPAPER COMPANY AND Negley D. Cochran, plaintiffs in error,
v.
THE UNITED STATES.
No. 371.

IN ERROR TO AND ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

MOTION TO DISMISS OR AFFIRM.

This is a proceeding for criminal contempt, instituted in the District Court of the United States for the Northern District of Ohio on October 28, 1914 (Information, R. 3–80). Defendants were adjudged guilty after a hearing (R. 105–108), and the case was appealed on writ of error to the Circuit Court of Appeals (R. 191), where the judgment of the lower court was affirmed (R. 413). The opinion of the District Court appears at pages 109–180 of the record, and that of the Circuit Court of Appeals on pages 414–420 (220 Fed. 458; 237 Fed. 986).

On January 10, 1917, a writ of error to this court was allowed by the Circuit Court of Appeals (R. 420–

423), and on March 12, 1917, a petition for a writ of certiorari was submitted, consideration of which was postponed to the hearing on the merits in accordance with a suggestion contained in the petition (p. 10).

It is submitted that the writ of error will not lie to review a judgment of the Circuit Court of Appeals in a contempt proceeding. This has been repeatedly decided in this court. The case, therefore, falls within the rule laid down in the following decisions: *Ex parte Kearney*, 7 Wheat. 38, 41; *New Orleans* v. *Steamship Company*, 20 Wall. 387; *Hayes* v. *Fischer*, 102 U. S. 121; *Ex parte Fisk*, 113 U. S. 713, 718; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251; *In re Chetwood*, 165 U. S. 443, 462; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Cary Manufacturing Company* v. *Acme Flexible Clasp Company*, 187 U. S. 427, 428; *O'Neal* v. *United States*, 190 U. S. 36, 38; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324; *Whitney* v. *Dick*, 202 U. S. 132; *Doyle* v. *London Guarantee Co.*, 204 U. S. 599, 603; *Gompers* v. *United States*, 233 U. S. 604, 606.

A few of the more important of the recent decisions which support the contention that this case is improperly here on writ of error may be briefly noticed.

In Cary Manufacturing Company v. *Acme Flexible Clasp Company*, 187 U. S. 427, 428, proceedings in contempt had been instituted by plaintiffs to punish an alleged violation of an injunction issued under the decree. Following the imposition of a fine of $2,000—one-half to be paid to the plaintiffs and one-half to the United States—defendants sued out a writ of error to the Circuit Court of Appeals and, after

affirmance of the judgment in contempt by that court (108 Fed. 873), a writ of error was allowed to this court. On this point it is said:

> It is apparent that the writ of error can not be maintained, as the judgment of the Circuit Court of Appeals was final. Judgments and decrees of these courts in all cases arising under the patent laws and under the criminal laws are made final by section 6 of the judiciary act of March 3, 1891. Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under section 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court.

In *O'Neal* v. *United States*, 190 U. S. 36, 38, defendant was found guilty of contempt of court in committing an assault on one Greenhut, a trustee in bankruptcy, and was sentenced to sixty days in jail. A writ of error was allowed from the District Court upon the assumption that the jurisdiction of the lower court was in issue. It turned out, however, that the contention was addressed to the merits of the case and not to the jurisdiction of the court. The writ of error was thereupon dismissed, the court saying: "The present judgment is in effect a judgment in a criminal case, over which this court has

no jurisdiction;" citing section 5 of the Court of Appeals act of March 3, 1891, now section 238 of the Judicial Code.

And in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 335, after reviewing the earlier cases, the court said:

> From these decisions it is apparent that the uniform ruling of this court has been against the right to review the decisions of the lower court in contempt proceedings by writ of error, or by appeal. * * *
>
> The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature and no provision had been made for a review of criminal cases.

In *Gompers* v. *United States*, 233 U. S. 604, 606, the defendants brought a writ of error and an appeal to this court, and also petitioned for a writ of certiorari. It was held that neither an appeal nor writ of error would lie, but the case was considered upon certiorari.

In the petition for the writ of certiorari in this case (p. 2), it is stated:

> The writ of error was allowed under section 241 of the Judicial Code, giving right to an appeal or writ of error to this court, in cases in which the jurisdiction of the Circuit Court of Appeals is not made final.

Section 128 of the Code provides that the judgments and decrees of circuit courts of appeals shall be final in all cases under the criminal laws, and in *O'Neal* v. *United States, supra*, it was held that a judgment imposing a sentence for contempt is a judgment in a criminal case, and, therefore, is final under this section. In any event, the writ of error was improvidently allowed under section 241, which provides for a writ of error in cases where the judgment of the Circuit Court of Appeals is not final, and where the matter in controversy exceeds one thousand dollars, besides costs. In the *Christensen Case*, 194 U. S. 458, it was held that where the fine imposed for contempt of court is punitive and in vindication of the authority of the court, it is to be regarded as a criminal action; and, therefore, this court has no jurisdiction either by writ of error or appeal. (See *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268.)

Here there exists no jurisdictional or constitutional question upon which the case might have been brought to this court from the District Court in the first instance, under section 238 of the Code. Therefore, review by writ of error in the Circuit Court of Appeals was entirely proper. And, inasmuch as it appears that the judgment of that court is final, it is submitted the writ of error herein should be dismissed.

An order was entered on September 29, 1914, by the judge of the District Court, *sua sponte*, directing the United States district attorney to prepare and file an information in contempt against The Toledo Newspaper Company, a corporation, and Negley D. Cochran, as editor, based upon certain publications appearing in a newspaper known as The Toledo News-Bee, published and edited by the defendants, respectively, between the 24th of March, 1914, and September 17, 1914, inclusive, which publications, separately and in their aggregate effect, amount to a contempt of the authority of the court as misbehavior so near to the presence of the court as to obstruct the administration of justice, with reference to a certain cause therein pending, and to proceedings growing out of the pendency of a cause, wherein Henry L. Doherty, Charles T. Brown, and Frank W. Frueauff, partners as Henry L. Doherty & Company (all residents and citizens of the State of New York; R. 153, 232), were plaintiffs, and The Toledo Railways & Light Company (an Ohio corporation) and the City of Toledo, were defendants, containing news articles, cartoons, and editorial utterances concerning the parties to said cause, the court wherein said cause was pending, and the judge thereof, reference being particularly made to the issues of said newspaper of March 24, 25, 26, 27, 28, 30, 31, August 14, September 5, 9, 10, 11, 12, 14, 16, 17, 1914 (R. 2–3).

The information was filed on October 28, 1914, containing three counts. The first count deals with publications between March 24 and September 12, 1914, affecting the cause pending in court entitled *Henry L. Doherty & Company* v. *Toledo Railways & Light Company;* the second count relates to publications of September 12 and 14, 1914, touching a collateral proceeding in contempt then pending in said court against one John Quinlivan, the rule to show cause against said Quinlivan in the contempt proceedings being entitled under the civil case whose title is given above; and the third count refers to the issue of said newspaper on September 17, 1914, relating to a proceeding in contempt against one Harry J. Howard, managing editor of The Toledo News-Bee. It is alleged that the Toledo Newspaper Company, a corporation, incorporated under the laws of the State of Ohio, for more than five years prior to September 17, 1914, published, sold, and generally circulated in the city of Toledo and vicinity thereof, and within the jurisdiction of the court, a daily newspaper called The Toledo News-Bee, and circulated within the territory aforesaid, each day approximately 50,000 copies of said newspaper; that for three years prior thereto the city of Toledo, in the northern district of the State of Ohio, was the residence of the judge of the District Court of the United States (R. 3).

In the spring of 1913 Doherty & Company entered into a contract for the management of the street car system in the city of Toledo, and continuously there-

after managed and operated The Toledo Railways & Light Company, under franchises previously granted by the council of said city; that on November 24, 1913, the council of said city passed an ordinance, known as the Schreiber ordinance, to go into effect March 28, 1914, on the expiration of the franchise of said street car company, by the terms of which ordinance the street car company was required to convey passengers at all hours over said system for a rate not to exceed three cents. The ordinance further provided, first, that any attempt of said street car company to run its cars on and after March 28, 1914, should be considered as an acceptance of the terms of said ordinance; and, second, that the city solicitor should make application to the proper court for an order compelling the street car company to obey the terms of said ordinance respecting said rate of fare (R. 4, 90, 236).

On January 16, 1914, Doherty & Company began an action in the nature of a creditor's bill in the United States District Court against said street car company, which suit remained a pending action in said court continuously until after the 17th day of September, 1914; that contemporaneously with the beginning of said suit, plaintiffs therein requested leave of court to make the city of Toledo a party thereto, and this was done on March 24, 1914 (R. 5, 248–49); thereafter plaintiffs filed in said cause a motion for a temporary injunction, restraining the enforcement on and after March 28, 1914, of the

Schreiber ordinance, alleging that said ordinance was confiscatory, unreasonable, and invalid (R. 5, 280-83).

The information charges that on and after the 24th of March, 1914, the defendants above named, in contempt of the authority of said court, and with reference to the proceedings in said suit then pending in said court and before the judge thereof, published and caused to be published and circulated in said newspaper, the newspaper headlines, cartoons, and alleged news articles more specifically set out in the several counts of the information; the first count containing fifteen specifications (R. 3–71); the second count having three specifications (R. 72–76); and the third count one specification (R. 76–80). From the various specifications of the first count it appears that on Monday evening, March 23, 1914, the city council defeated a motion to postpone the enforcement of the Schreiber ordinance after the 27th for a reasonable time within which to determine the franchise question.

The issue of the News-Bee of Tuesday, March 24th, is the first plead in the information; the article in question occupying more than five columns under a heading extending across eight columns, the width of the paper, entitled: "Big Con Fights Three Cent Fares in Federal Court; May Ask Injunction Against the Schreiber Ordinance," meaning by the use of said words "Big Con" said street car company and said partnership. Said defendants also caused to be published and circulated at the same time, under said headline, a cartoon entitled: "At the Last Ditch,"

and a news article, said news article being on page five of said newspaper and containing, among other language, the following: (a) "Thurstin (meaning the City Solicitor of said city) Declares He Intends to Fight Until There is Nothing Left—Will Defend Anyone Who Will Not Pay"; (b) "Thurstin Promises to Protect Riders"; (c) Solicitor Thurstin Promises to Protect Those Who Are Ejected From Street Cars for Refusing to Pay More Than Three Cents;" (d) "Solicitor Thurstin Declares He Will Protect Any Person Put Off a Car Because of His Refusal to Pay More Than Three Cents Fare." (R. 6–19.) It is charged that said language just quoted tended, and by said defendants was intended in connection with said headlines, to convey to the public, and give the public to understand that the city solicitor of the city would protect any person who might refuse to pay more than a three-cent fare on said street car system, notwithstanding any order, finding, or holding which the court might enter or make in said suit. The hearing on the motion for a temporary injunction, filed on March 24th, was arranged between the parties to be held at Cleveland on Thursday, the 26th, but owing to the illness of the judge the hearing was postponed until March 28th at Toledo, when it was had, and for reasons stated in the memorandum opinion filed on March 30th (R. 303–312) the motion was overruled, but the main case was not otherwise affected.

On Wednesday, March 25th, the day before that set for the hearing on the motion for a temporary injunc-

tion, defendants published in said newspaper a headline extending across five columns of the first page, in the following language: "Car Riders May Ignore Order Barring Low Fare"; and also caused to be published, at the same time and under said headline, a cartoon entitled, "A Desperate Case," which cartoon represented an extremely corpulent individual in bed, in evident suffering, surrounded by attorneys and officers of the street car company, their faces indicating alarm, and the cartoonist putting into the mouth of one of the attorneys the expression, "Guess We'd Better Call in Doc. Killits," meaning the judge of the court wherein the cause entitled *Doherty & Company* v. *The Toledo Railways & Light Company and the City of Toledo* was then pending, together with a news article concerning said cause. The information charges that the defendants intended by said cartoon to convey the impression that the existence and life of said street car company was in danger and could only be saved by the powers of the District Court and the judge thereof; and also intending by said headline, "Car Riders May Ignore Order Barring Low Fare," to convey to said court and the public that citizens riding on the cars of said street car system would ignore and refuse to comply with any order that the court might make in said pending cause, restraining or enjoining the enforcement of the Schreiber ordinance (R. 20–22); that in the same issue of said newspaper the defendants, on the editorial page thereof, caused to be published an editorial in large type across two columns, under the heading "Municipal Owner-

ship the Only Way to Street Railway Peace"; and
said editorial page, referring to the fact that the judg
of the court wherein said cause was pending ha
granted permission over the telephone on the previou
day for the filing of a motion making the city
Toledo a party to said cause, said defendants pub
lished the following: "Holding court over the tel
phone is a new one, but it seems to be a highly sati
factory method of doing business." (R. 23–25.)

On Thursday, March 26th, being the day set for th
hearing at Cleveland (which in fact was postponed un
til March 28), said defendants published in said news
paper a headline extending across the top, over eigh
columns of the first page, in the following languag
"Killits Upsets Low Fare Order." It is charged i
the information that said statement was wholly un
true so far as it attempted to convey, as defendan
did so attempt, the impression that the judge ha
made an order in the pending cause. At the sam
time defendants published in said newspaper, und
said headline, a news article concerning the proceed
ings in the suit, and on page five of said newspap
two other news articles, one under the headin
"Judge Says Order May be Issued Friday if Cond
tions Warrant," and the other under the headin
"Mayor Won't Tell His Plans if There's Riot." (R
26–33.) On the editorial page of said issue defendan
published four editorials with reference to the matte
published in the aforesaid news articles.

On Friday, March 27th, defendants published i
said newspaper news articles and cartoon under th

following headlines: (*a*) Under a headline extending halfway across the first page, entitled, "All Urge Peace in The Car Contest; People Are Asked to Rely on Courts," said news article being continued to page six; (*b*) on said first page two other news articles, one under the heading, "Inflammatory Speeches to Be Frowned Upon at Memorial Hall Meeting," and the other entitled, "Mayor Will Be Among First to Test Question"; (*c*) also, a cartoon on the first page entitled, "As We Lose Kapp We Get Lapp," Kapp being the surname of the director of public safety of the city of Toledo, and Lapp being the surname of the United States marshal (R. 34–44). It is charged in the information that said cartoon purported to represent, and intended to convey the impression, that the marshal of the court was hastening to Toledo from Cleveland with an order of the court, although, in fact, no order of any kind had then been issued by the court in the premises; and, further attempted to create the impression, and was so intended, that the safety director of said city was leaving the city to avoid responsibility for the conditions anticipated to result if said street car company should insist upon more than three-cent fare from passengers attempting to ride on said street car system the next day. On the editorial page of said issue defendants published an editorial entitled "The Big Con's Attitude Is the Same Old Defance of the People," and with reference to said suit,

among other language, the following: "It (meaning said street car company) is now a trespasser on many streets of Toledo and will be on practically all of them by tomorrow morning. It has now rushed into the Federal court to try to take from the hands of the people of Toledo the right to control their own streets and to make terms under which the Big Con may use those streets." (R. 44.) It is charged that said editorial, and the language quoted therefrom, tended and was intended by defendants to give the impression to the public that the Federal court, and the judge thereof, would not protect the rights of the citizens of Toledo in any order or decision or judgment which said court might enter, but, on the contrary, would attempt to take away from said people their right to control the streets of said city and give such control to said street car company.

On Saturday, March 28th, before the court had decided the motion for a temporary injunction, defendants published in said newspaper a headline across five columns of the front page thereof, entitled, "Thousands Are Riding Free; Killits Hears Big Con Plea," and on page five a headline, "Killits Hears Technical Question and Merits of Big Con's Suit for Injunction; Thousands Are Riding Free"; and also, under said headline on the first page, a cartoon entitled: "Doherty—The Man Who Put the Con in Conductor," which cartoon represented the mayor of Toledo as stating to Doherty that he would not pay more than three cents fare. It is

charged that this cartoon was intended by defendants to give the impression to the judge that not more than three cents fare would be paid by the mayor, notwithstanding any order which might be made by the Federal court (R. 44–45).

On Monday, March 30th, defendants published in said newspaper two news articles, one under a heading in large type, "Car Contest Is in Two Courts; Ruling Delayed," and the other under the heading, "The Free Riders Number 62,000." (R. 45–48.)

On Tuesday, March 31st, after the court had overruled the motion for a temporary injunction, defendants published on the first page of said newspaper two news articles, one on the first page and continued to page nine, under the heading, "Doherty Suggests Test of Lower Fares; Big Con Broke," and the other under the heading, "Killits Passes Fare Fight to State Courts," together therewith on said first page a cartoon under the title, "How Many Times Did You Ride Free?"; and on the editorial page, by way of comment upon the court's opinion in said cause overruling the motion for a temporary injunction, defendants published an editorial as follows: "To the layman it appears peculiar that the city can not stop the company's cars because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights regardless of the needs of the people. Reminds us somehow of the elder Vanderbilt." It is charged that defendants by said editorial intended to convey the

impression to the public that the court and the judge thereof, like the elder Vanderbilt, had in its decisions and opinions no regard for the public, and further, that said editorial statement was a direct misrepresentation of the court's holding upon said motion and of its reasons for refusing to grant said motion (R. 48–55). On August 10, 1914, the plaintiffs in said pending suit and the defendant street car company therein, filed motions renewing application for a temporary injunction against the city of Toledo, again praying the court to enjoin the enforcement of the Schreiber ordinance. Said motions came on to be heard on August 14, 1914; on that day were partly heard, and the hearing thereof was continued until September 8, 1914.

On August 14th, defendants published in said newspaper, on page ten thereof, a news article under the heading: "Test of Schreiber Ordinance Comes in U. S. Court September 8; Killits Puts Burden on City." It is charged in the information that said heading is misleading, untrue, and a misrepresentation of the holding of the court in that it was intended to and did convey the impression that the court had placed upon the city of Toledo the burden of sustaining the reasonableness of its own legislation, namely, the Schreiber ordinance. The impression so occasioned seems to have been the inspiration later for an inflammatory attack on the court by a local organization, out of which grew the

attachment for contempt of John Quinlivan (R. 55–59).

On September 5th, defendants published in said newspaper, on the editorial page thereof, the following: "If Judge Killits should be held in Canada while Henry L. Doherty is marooned in Wall Street, what would we ever do? Still, Peter Parker is always willing to give us good advice." The information charges that said editorial was published with intent to belittle the judge, and with intent to associate him in the public mind with said parties in operation and control of the street car company, and with one Peter Parker, said last-named person being a resident of Toledo, and a person whom the defendants assumed was and is unpopular, and an object of ridicule among the citizens of Toledo by reason of repeated denunciations of him through said newspaper (R. 58).

On September 9th, defendants published in said newspaper a news article under the heading, "Socialists Call Big Con Trespasser," a portion of a resolution adopted by the local organization of Socialists at a meeting on September 6, 1914, condemning the court for its alleged usurpation of power belonging only to the citizens of said city and its duly elected legislative body, and demanding that the officers of the city give protection, police and otherwise, to those who should refuse to obey any order which the court might make in the premises. It is charged in the information that because of the publication of the

aforesaid news articles, editorials, and cartoons by the defendants, with reference to the proceedings then pending in court, and the misrepresentation as to what the court had done, much hostile feeling had been aroused toward the court with respect to said cause, especially among the membership of the local organization of Socialists, and that said resolution was, and was intended to be, in criticism of the court and the judge thereof, as defendants well knew when so publishing the same (R. 59). On September 8 and 9, 1914, hearings were held upon the motions for a temporary injunction and the matter was finally submitted on the last named date, whereupon the court took the same under advisement, stating distinctly that no decision would be handed down for two or three days.

On September 10th, defendants published on pages one and two of said newspaper a news article under the heading: "Low Fares Banned by U. S. Judge;" "Killits Practically Knocks Out Schreiber Ordinance." It is charged that defendants intended to convey the impression that the court had decided said motions against the city and said Schreiber ordinance, although in fact and in truth the court had made no order whatever in the premises, and had not reached a conclusion as to its duty therein. On the evening of the same day, at a meeting of the Central Labor Union, an organization composed of accredited delegates from the various labor unions of the city of Toledo, the anticipated action of the

court, as indicated in the news article above mentioned, was the subject of severe criticism by one John Quinlivan, and the impeachment of the District judge was demanded in the event that he should decide the issues on said motions in favor of the street car company, and a resolution was read by said Quinlivan denouncing the court for placing "the burden of proof of the Schreiber ordinance on the city." (R. 59–65.)

On September 11th, while the court still had under consideration its decision on the motions for a temporary injunction, defendants published in said newspaper an account of the proceedings taken at the meeting of the Central Labor Union under the heading, "Judge Killits Is Criticized in Central Labor Union Meeting." (R. 65–67.) On September 11, 1914, an attachment in contempt was issued for said John Quinlivan.

On September 12th, before the court had rendered any decision upon the pending motions, defendants published in said newspaper, under the guise of printing the news of the contempt proceedings against said Quinlivan, a news article under the headline, "Killits Accuses John Quinlivan of Contempt," and the offensive and threatening language attributed to him was extracted from the body of the article and placed in different and more prominent setting, embellished with a rule border known as

"boxing," as a distinctive feature of the front page, after this fashion (R. 67–71):

> **BASIS OF CHARGES AGAINST UNION LEADER.**
>
> These are the remarks alleged to have been made by John Quinlivan and on which Judge Killits bases his contempt charges:
>
> "The street car situation of Toledo is in the hands of a friend of the Rail-Light.
>
> "Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.
>
> "Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be the goat. The Central Labor Union should adopt stinging resolutions and let our Federal friend know what we think of him.
>
> "The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.
>
> "Impeach Killits."

It is charged that the aforesaid publications of the defendant, each and singular, and in the aggregate, constituted misbehavior so near the presence of the court as to obstruct the administration of justice with reference to the cause therein pending, and that the effect of said publications, each and singular, and in the aggregate, tended and was intended to embarrass the court and to obstruct the administration of justice by the court in the performance of its duty with reference to the issues involved in said

cause, through an impression to be conveyed to the judge, to the effect that any order he might make favorable to either said partnership or to the street car company would meet with great public disfavor; and also tended to hinder said judge in the exercise of a clear and impartial judgment in said cause, in that publications impugning the motives of the court tended to interfere with the administration of justice, and were intended to provoke among the citizens of Toledo, with reference to said pending cause, an open resistance to any order which the court might make therein (R. 71).

On September 12th, defendants published in the home edition of said newspaper, a headline extending across two columns on page 1, entitled: "Quinlivan Is Ready to Defend Killits' Contempt Charges," together therewith a headline entitled: "Basis of Charges Against Union Leader," and the news article referred to hereinabove. Referring to the contempt proceedings against said Quinlivan, the defendants published at the same time an alleged news article containing among other printed language the following: "Judge Killits stated on Saturday that he would hear the case himself," which statement, the information charges, was untrue, and a misrepresentation of the facts, in that said judge had not then at any time announced or stated that he would hear said case or proceedings against Quinlivan (R. 73–74).

On Monday, September 14th, defendants published in said newspaper, with reference to said proceedings

in contempt against Quinlivan a news article under the heading, "Quinlivan Case Is Set for Wednesday," together with the following language, "Killits has announced that he will hear the case." The information charges that this statement was untrue, and a misrepresentation of the facts, in that the judge had not then at any time announced or stated that he would hear said case or proceedings against Quinlivan (R. 74). On another page of the same issue of September 14th a communication, under the head, "In the Editor's Mail," defendants published the following (R. 74–75):

THE QUINLIVAN CASE.

To the Editor:

Regardless of whether Judge Killits has or has not the right to sit in judgment in the Quinlivan case, it seems to me that the ethics of the affair would lead him to either appoint some other judge to hear the evidence, or, better still, have some other authority make the selection. It stands to reason that such tactics on the part of the judiciary will not have a tendency to instill in us more confidence.

Paul G. Dennie.

And on the editorial page of said issue of September 14 defendants published in black-face type across the top of two columns, referring to said contempt proceedings against Quinlivan and the aforesaid communication, the following: "Would it be contempt to remark that it is a peculiar situation where

the officer who makes the charge, also considers the evidence, renders the verdict, and imposes the sentence?" (R. 75.) The information charges that the defendants in printing and circulating the aforesaid publications, each and singular, and in the aggregate, were guilty of misbehavior so near the presence of the court as to obstruct the administration of justice with reference to the proceedings in contempt hereinabove referred to, then pending before the court; that said publications, each and singular, and in their aggregate effect, tended and were intended to embarrass the court and to obstruct the administration of justice with reference to the issues involved in said contempt proceedings, through an impression to be conveyed to the judge of said court that any order he might make in said contempt proceedings would not be made in good faith, should he, himself, proceed to a hearing of the issues therein involved; and, further, said publications tended and were intended to impugn the motives of said judge and to provoke among the citizens of Toledo, with reference to said pending contempt proceedings, an open resistance to any order which the court might make therein, and to bring to the mind of said judge an impression that any order he might make in said contempt proceedings would not be fair or just to said Quinlivan (R. 75–76). On September 15, 1914, an attachment in contempt was issued for one Harry J. Howard, managing editor of said newspaper, for causing to be published in said newspaper the headlines, alleged news articles, and other publications

above referred to with reference to the contempt proceedings against said Quinlivan; that the same immediately became and from then continuously until September 17, 1914, remained a pending prosecution and proceeding in contempt, before the judge of said court, the same being entered on the criminal docket therein.

On September 17, while said prosecution and proceeding in contempt against Harry J. Howard was still pending as aforesaid, defendants published in said newspaper, on the first page thereof, a double column editorial or newspaper article, entitled "The News-Bee and Judge Killits." (R. 78–79.) It is charged that said article tended and was intended to belittle and ridicule the judge of the court with reference to the contempt proceeding then pending against said Harry J. Howard, and that said publication constituted misbehavior so near the presence of the court as to obstruct the administration of justice with reference to said contempt proceedings, and further, tended and was intended to provoke among the citizens of Toledo, with reference to said contempt proceeding, an open resistance of any order which the court might make therein (R. 79).

Defendants demurred to the information and each count thereof on the grounds that the acts of defendants alleged did not constitute contempt and that the court was without jurisdiction in the premises (R. 80, 81), which demurrers were overruled (R. 82), and an opinion in support of the court's ruling was filed on December 4, 1914 (R. 82–88).

Defendants filed a joint answer (R. 89–103), in which is set forth briefly a history of the controversy between the street railway interests and the city of Toledo, together with a copy of the Schreiber ordinance. The answer also recited the substance of the pleadings and proceedings in the Doherty case, which, it is alleged, was instituted collusively and by prearrangement with the Toledo Railways & Light Company. In answering the counts of the information separately defendants admit that they caused to be published in The Toledo News-Bee on the days charged, the several headlines, quotations, editorials, articles, and cartoons set out in the information, but deny the innuendoes and inferences sought to be drawn therefrom, or that the publications constitute misbehavior or contempt as charged in the information.

The case came on for hearing December 28, 1914 (R. 104), and on January 23, 1915, the court rendered an opinion (R. 109–180) adjudging the defendants guilty and imposing a fine against The Toledo Newspaper Company of $7,500, and against Negley D. Cochran of $200. A writ of error to the Circuit Court of Appeals for the Sixth Circuit was allowed March 31, 1915 (R. 186), and the opinion of the Circuit Court of Appeals, affirming the judgment of the lower court, was filed on December 15, 1916 (R. 414–420).

ARGUMENT.

I.

THE QUESTION IS PURELY ONE OF THE CONSTRUCTION OF THE STATUTE.

First. Has a Federal court inferior to the Supreme Court power to protect itself by summary process from newspaper assault upon parties and the court itself, intentionally designed and boldly undertaken to influence the court's consideration of a pending case?

Second. Defendants publish an influential paper with large circulation in and about the city where the lower court sits, and in which the judge of the court resides, concerning a cause under the lower court's consideration to which the citizens of the city are parties by the representation of the city administration, over an issue which has divided and excited public sentiment in the city for many years, and the record presents publications in defendants' newspaper which have the appearance of an attempt to influence or intimidate the court in its determination of the cause, and to encourage resistance by a large body of the people of the city to possible decrees in the cause. These publications, aside from whatever may have been the purpose of defendants in publishing them, have a tendency to create a sentiment unfavorable to one of the parties to the cause and also to the judge of the court, and have a further tendency to greatly inflame against both

the court and certain parties to the cause the sentiment of a large portion of the population of the city. *Query:* Is the conduct of defendants in putting forth such publications "misbehavior * * * in the presence of the court or so near thereto as to obstruct the administration of justice?"

The facts, which counsel for plaintiffs in error do not discuss, amply justify the formulation of the questions in this precise form.

The law involved is section 268 of the Judicial Code (36 Stat. 1163; R. S., sec. 725; act of March 2, 1831, 4 Stat. 487). The exact part of the law applicable to this case as it now stands is as follows:

> *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their [the court's] presence, or so near thereto as to obstruct the administration of justice, etc.

On page 39 of this brief is printed the act as it passed Congress in 1831, under the title "An Act Declaratory of the Law Concerning Contempts of Court."

Parties have a constitutional right to have their causes tried fairly in court by an impartial tribunal uninfluenced by newspaper dictation or popular clamor. From the charges set forth in the information it appears that the News-Bee was engaged in an elaborate attempt to thwart the judicial determination of the case in the District Court, regardless of consequences.

Counsel for plaintiffs in error base their entire argument upon the proposition that the Federal law governing cases of contempt is the same as the law of the State of Pennsylvania which governs contempts, and that it was passed to curtail the power of the lower Federal courts to deal with newspaper offenses such as are found in this record. In this assumption counsel for plaintiffs in error are seriously wrong. If the law governing contempt as affecting United States judges and courts was the same as the law in Pennsylvania, then their brief would be applicable to the present case, but in view of the fact that the Federal law governing contempt is not the same as the law of Pennsylvania, their argument is not well taken in its essential points.

The Circuit Court of Appeals determined the questions presented by applying to the acts of plaintiffs in error the law of contempt as it is administered in substantially all the State jurisdictions, as it always was and is now at common law (*Patterson* v. *Colorado*, 205 U. S. 454, 462; Bishop's New Criminal Law, secs. 259, 260, 261; Bailey, Habeas Corpus, c. 7; Oswald, Contempt, pp. 91, 92, 97; Rapalje on Contempt, sec. 56; 9 Cyc. 20), and as it is now in England, and as it was in the Federal jurisdiction prior to 1831 (*Hollingsworth* v. *Duane*, Fed. Cases No. 6,616; *United States* v. *Hudson*, 7 Cranch 32).

Lord Chancellor Hardwicke (2 Atkyns 471) describes three classes of contempts: (1) Scandalizing the court itself; (2) abusing parties who are concerned in causes pending before the court; (3) prejudicing

mankind against persons, before the cause is determined. All referring to publications. (Likewise see: 2 Vesey 520; 1 P. Wms. 675; 4 Blackstone Com. 282; 2 Hawkins, Pleas of the Crown, 230; 29 Am. Law Reg. 82.)

While courts, when a case is finished, are subject to the same criticisms as other people, they have power to prevent interference with the course of justice by premature statements, arguments, or intimidation, and the truth is not a defense in a contempt proceeding based on an improper publication made during the pendency of a suit. Oswald, Contempt of Court, p. 211; citing *Patterson* v. *Colorado*, 205 U. S. 454.

In Bishop's Criminal Law, section 216, the author says:

> According to the general doctrine any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.

After the conclusion of the judgment, newspapers are entitled to comment thereon, and whatever the court has treated as facts the critics may also treat as facts. The publication of legal proceedings is often treated as a contempt, because the publication if premature interferes with the proper func-

tion of the court by disturbing the minds of judges, as well as jurors and bystanders. This is a doctrine which by no means conflicts with the most ample liberty on the part of each member of the public to exercise his own right of comment after the decision has been given. Paterson, Liberty of the Press, p. 127.

Generally, comments on a cause, written or published, spoken or threatened, while it is pending, and prejudicing, or calculated to prejudice, any party, and particularly paragraphs in newspapers having that effect, are contempts. The question in every case is not whether the publication in fact interferes, but whether it *tends to* interfere, with the due course of justice. Oswald, Contempt of Court, pp. 92–93. In England, including Scotland, Canada, Australia and South African colonies, "trial by newspaper" is not tolerated. Only a true and fair report of evidence and court proceedings are allowed to be published *pendente lite* in civil as well as criminal cases.

The rule is now firmly settled that it is contempt to issue publications which are calculated to prejudice or prevent fair and impartial action in a cause of judicial investigation *while pending*. The language employed need not have brought the court into disfavor and endangered the proper respect for the court, or actually embarrassed or impeded the progress of the court or the administration of justice therein, if it was of a character calculated to produce such an effect.

It was the judgment of both the District Court and the Circuit Court of Appeals that the legislation by Congress in 1831 did not abridge the power of inferior Federal courts in the particular applied in this case, and such is also the view of the Supreme Court of Virginia, which State early adopted the Federal law as the law for its own people. *Carter* v. *Commonwealth*, 96 Va. 791.

The act of Congress of March 2, 1831, to be interpreted by the court in this cause, was made the law of Ohio in 1834 (12136 General Code of Ohio), and has received the same construction by State courts which was given to the Federal act in this case. *Myers* v. *State*, 46 Ohio St. 473; *Steube* v. *State*, 3 Ohio Cr. Ct. 383; 2 O. C. D. 216.

The crucial question is whether this statute, now section 268 of the Judicial Code, which, as shown by its title, was intended only to be "An act declaratory of the law concerning contempts of court," worked, in fact, so far as newspaper assault upon the court respecting a pending case is concerned, a complete emasculation of the law as it then stood. If this act of Congress to declare the law accomplished the law's destruction then, and then only, should plaintiffs in error be relieved from the judgment below.

There being no negative words in the act of March 2, 1831, restricting the jurisdiction or character of cases enumerated, it is proper, as by its title indicated, that it should be considered as "declaratory of the common law." Its constitutionality was sustained in *Ex parte*

Robinson, 19 Wall. 505, which arose in the District Court for the Western District of Arkansas in 1873. However, that was not a newspaper case.

The statute did not change the procedure, nor did it change the class of things punishable as contempts at common law. (*In re Daniels-Cuyler* v. *Atlantic & N. C. R. Co.*, 131 Fed. 95, 97.) Therefore, to contend that newspapers are immune from punishment for contempt when they did not possess any such immunity prior to the enactment by Congress, is as illogical as is the contention of a contemnor that he is entitled to a jury trial, the rule having always been that trial by jury was not obtainable in these cases as a matter of right, because no such right existed at common law. (*United States* v. *Duane*, Fed. Cases, No. 14,997; 1801.) The statute merely defined the character of what was thereafter to amount to contempt. There is in this regard a wide difference between character and class in a legal sense. The language of a restrictive statute should be clear and explicit before courts can be limited in the exercise of inherent powers. Courts of justice should not be deprived of powers necessary for self-protection. Opponent's construction would not only be manifestly narrow, but would also destroy this power of the court to protect its essential dignity.

In *Patterson* v. *Colorado*, 205 U. S. 454, 463, it is said:

> Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their

administration of the law. But if a court regards, *as it may*, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation can hardly be denied (citing *Ex parte Terry*, 128 U. S. 289; *Telegram Newspaper Company* v. *Commonwealth*, 172 Mass. 294; *State* v. *Hart*, 24 W. Va. 416; *Myers* v. *State*, 46 Ohio St. 473, 491; *Hunt* v. *Clarke*, 58 L. J. Q. B. 490, 492; *Rex* v. *Parke* (1903), 2 K. B. 432). [Italics supplied.]

In *Independent Publishing Company* v. *United States*, 240 Fed. 849 (February 13, 1917), the Court of Appeals for the Ninth Circuit affirmed the judgment of the lower court holding the defendants guilty of contempt for publishing statements relating to a defendant in a criminal case then on trial, such as that he was a paroled convict from the penitentiary of another State, and was said to have committed other crimes described, etc., the same not being based on any evidence in the case, nor admissible therein.

In *United States* v. *Providence Tribune Co.*, 241 Fed. 524 (April 3, 1917), a motion by defendant to dismiss an information in contempt was denied by the District Court, the offensive article stating that certain named witnesses were taken before the grand jury and that it was believed they had given the

authorities much valuable evidence, and that prescriptions had been found in their possession which would play a prominent part in the future, the court holding that interference with the proceedings of a grand jury in the performance of its functions is as truly a contempt of court as is interference with the proceedings of a petit jury, and punishable under section 268 of the Judicial Code.

Publishing a misleading statement as to the effect of a temporary injunction or which misrepresents a court's decision, is contempt. *Gorham Mfg. Co.* v. *Emery-Bird-Thayer Dry Goods Co.*, 92 Fed. 774.

The facts so thoroughly condemn plaintiffs in error, that it is not surprising that they are ignored in their brief. The effect of the several publications with their relation to each other to the enlargement of their powers for mischief, is made the subject of an accurate deduction by the District Court in its opinion (R. pp. 159, 160–178).

The position of the plaintiffs in error, if we understand it, may be stated thus:

A. The act of March 2, 1831 (now section 268 of the Judicial Code), excludes from its operation the press and leaves newspapers immune under all circumstances.

B. Even though the press possesses no immunity under the statute, the contemptuous conduct of the defendants as charged in the information was not misbehavior so near the presence of the court "as to obstruct the administration of justice."

The first (*A*) proposition of plaintiffs in error is not to be gathered from the language of the statute, which does not except any person or corporation or institution from its provisions. So far as any tenable construction of its language goes, any person or corporation whose conduct comes within the description of the statute is punishable under its provisions. We therefore insist that the statute itself negatives this first proposition.

Plaintiffs in error seek to sustain their contention by certain judicial expressions which would legislate into the statute this assumed immunity of the press. Two of these (*In re May*, 1 Fed. 737, 742; and *Morse* v. *Montana Ore-Purchasing Co.*, 105 Fed. 337) are mere *dicta;* so far as another (*In re Daniels-Cuyler* v. *Atlantic & N. C. R. Co.*, 131 Fed. 95) attempts this judicial legislation, it simply follows *In re Poulson*, Fed. Cases No. 11,350, a Circuit Court decision, which is as extreme an example of modifying or limiting the meaning of an unambiguous statute, and of reading into it by judicial treatment something its unequivocal language does not say, as can be found in the books.

The only reason (he can not find it in the terms of the statute) which Justice Baldwin (in Poulson's case) can give for his view of the act is to be referred to his understanding—or, rather, misunderstanding—of the controversy in Congress over Judge Peck's case. It is noteworthy that the contempt proceedings against Lawless, out of which developed the Peck impeachment case, and later the act of March

2, 1831, was for publishing a criticism of Judge Peck's opinion *after the determination of the litigation before the court.* It has never been held, except for the language of Justice Baldwin in the Poulson case, that the statute was intended as a limitation upon the inherent power of a Federal court to punish as contemptuous the publication of offensive news articles *during the pendency of the litigation.*

This statute is so unambiguous that reference to the course of legislation producing it is not permissible; its terms need no elucidation. But if we follow Justice Baldwin's course, and thoroughly examine the proceedings in Congress generating this act, we find not only no justification for modifying its provisions to meet more accurately the congressional intention, but, rather, we find somewhat affirmatively that a purpose existed not to exempt any class of persons, particularly the press, under all circumstances. This matter has been so fully treated by the District Court (R. 133–137; 220 Fed. 478–482) that we need not repeat it here.

Counsel for plaintiffs in error fall into a mistake of fact, in stating (p. 22) that when Congressman Draper of Virginia (February 1, 1831) offered his resolution providing for a definition of the Federal law of contempt, his State "had long had a statute similar to the Pennsylvania statute." This statement is wholly without any basis. In June, 1824, the General Court of Virginia decided *Commonwealth* v. *Dandridge* (2 Va. Cases 408), one of the most celebrated decisions in the law of contempt. The court found authority

for holding Dandridge to exist wholly and only at common law; there was no statute in any way dealing with the matter. In 1829, the legislature passed an act regulative, only, of the preservation of a record in proceedings in contempt, but it was not until within two months after the Federal act of 1831 was passed, or April 16, 1831, that, for the first time, Virginia enacted a statute attempting to declare the law of contempt and to prescribe the manner of punishment. That the terms of this act were influenced by the then recently enacted Federal legislation is plain from an inspection. It is quoted in *Carter v. Commonwealth*, 86 Va. 791. The first subsection defines as contempt "misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice." A reading of the opinion in the Carter case shows that it was the opinion of the Virginia Court of Appeals that, if necessary to apply it, this clause sufficed to determine Carter's act as a contempt. Carter, by sending to his counsel a telegram stating falsely that he was sick with typhoid fever, attempted to get a continuance of an action pending against him. The court held that this was a contempt of court because it "tended directly to impede and obstruct the administration of justice." The point of special controversy in that case was whether the legislature could, constitutionally, require constructive contempts to be tried to a jury. In the opinion the court observed that the Federal act of 1831, copied in Virginia, "is so comprehensive as to afford com-

plete protection to the courts in the performance of their duties." (R. 144.) Attention is earnestly invited to the opinion by the Virginia court respecting the power of Federal courts under this act as in marked contrast with Justice Baldwin's notion in the Poulson case, that "the court is disarmed in relation to the press. It can not protect itself or its suitors."

The brief of plaintiffs in error, however, does invite a consideration which is not entertained in the opinion of the District Court or that of the Circuit Court of Appeals, and which further justifies the thought that Congress rejected the idea of press immunity. We may safely assume with opposing counsel that the Federal legislation was in a measure affected by the early controversies and the resulting legislation in the State of Pennsylvania, whereby the press was specially privileged to abuse courts with reference to pending cases. Indeed, Mr. Buchanan, after having served as leader for the House in the presentation of the articles of impeachment against Judge Peck, became the draftsman of and spokesman for the Federal law which he introduced immediately that the impeachment was not sustained by the Senate.

II.

PENNSYLVANIA AND FEDERAL ACTS COMPARED.

Agreeing thus with counsel, we ask the court to consider that, in the very similitudes and divergencies between the State and Federal acts, we find clear evidence that Congress did not intend to work

for newspapers that exemption which they had obtained from the Pennsylvania Legislature. We print here in parallel columns the Pennsylvania act of 1809 and that which Congress enacted in 1831:

PENNSYLVANIA ACT. (Act of April 3, 1809.)	FEDERAL ACT. (Act of March 2, 1831.)
An act concerning contempts of court.	An act declaratory of the law concerning contempts of court.
SEC. 1. The power of the judges of the several courts of this Commonwealth, to issue attachments and inflict summary punishments for contempts of court, shall be restricted to the following cases, that is to say, to the official misconduct of the officers of such courts respectively, to the negligence or disobedience of officers, parties, jurors, or witnesses against the lawful process of the court, to the misbehavior of any person in the presence of the court, obstructing the administration of justice.	That the power of the several courts of the United States to issue attachments, and inflict summary punishment for contempts of court, shall not be construed to extend to any cases, except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.
SEC. 2. All publications out of court, respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in, or concerning any cause pending before any court of this	(Not carried into the Federal statute.)

Commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same.

From this comparison it will be seen that Congress adopted the substance and, in some degree, the phraseology of section 1 of the Pennsylvania law, with the significant addition of the provision, nowhere deducible from the State measure, that any misbehavior is subject to summary treatment which, although beyond the presence of the court, is yet "so near thereto as to obstruct the administration of justice." Thus, having added to the first section this provision which so materially enlarges the Federal act beyond the scope of the State law, and which is plainly not a substitute for the second section of the Pennsylvania act, Congress went still further, and omitted altogether the Pennsylvania second section.

We gather from this examination of the two acts that the very element which distinguishes the Pennsylvania law from the accepted law of contempt Congress sought to avoid. Let counsel for plaintiffs in error answer why, if Congress intended to do for newspapers by the act of 1831 what the Pennsylvania act of 1809 did, it did not employ the same unmistakable provision?

It is to be expected that counsel for plaintiffs in error would make much of *Poulson's Case*, *supra*. The District Court (R. 129, 130, 138, 139; 220 Fed.

474, 475, 481, 482) paid particular attention to this case. We invite this court's notice to the extreme views entertained by Justice Baldwin, embodied in the quotations from his opinion which the District judge makes and which caused Chancellor Kent to say (R. 139; 220 Fed. 482) that his interpretation of the law was unreasonable, and the Supreme Court of Tennessee to observe that "it is altogether probable that the *breadth of expression* (emphasis is the court's) employed by Judge Baldwin, to declare the immunity of the press, may require limitation" in proper cases. The Supreme Court of Tennessee, in *Tate* v. *State*, 132 Tenn. 131, discussed hereafter, found a demand to considerably limit Justice Baldwin's views, as did the Supreme Court of Ohio in *Myers* v. *State*, *supra*. We have every confidence that when this court considers the decisions rendered since Justice Baldwin sat in Poulson's case, and when it regards the circumstances attending the passage of the act of 1831 in connection with Justice Baldwin's view of the act, the soundness of his opinion will be much lessened in its estimation.

III.

WHAT IS THE STANDARD BY WHICH TO DETERMINE "NEARNESS"?

The legal question on this record is directly involved in the interpretation to be given to the phrase "so near thereto (the presence of the court) as to obstruct the administration of justice." In a mem-

orandum handed down on demurrer the District Court said (R. 82):

> We feel, as when the order was entered, that the trend of interpretation, by application, of the language of section 268, Judicial Code of the United States—"so near the presence of the court as to obstruct the administration of justice"—manifested by every decision of Federal courts of all grades, after the *Robinson Case*, 19 Wallace, from *In re May*, 1 Fed. 737, to *United States* v. *Huff*, 206 Fed. 700, including, in fact, *In re Daniels*, 131 Fed. 95, to apply, as a criterion of application of the statute, the directness of the tendency of the act to affect a pending cause rather than its mere physical or topographical nearness to a sitting court, justifies our view that interference by improper newspaper comment with a pending case may be within the statute.

In the extended opinion (R. 126–146; 220 Fed. 472–488) all the Federal cases dealing with this section are analyzed and commented upon. In the court's treatment of these cases it is seen how all of the decisions after the Poulson case that do not involve mere *dicta*, as in Robinson's, May's, and Morse's cases, travel toward the doctrine correctly summarized in the quotation just made from the court's memorandum on demurrer.

Nowhere can there be found a better illustration of the fallibility of *dicta* as authority than in a comparison of the decisions in *In re May*, 1 Fed. 737, and *Ex parte Schulenburg*, 25 Fed. 311.

These decisions are by the same judge, and he was subsequently a member of this court when it refused McCaully relief (198 U. S. 582, 586). In May's case he decided that misconduct by a juror away from the court and during an overnight recess, was so near the presence of the court "as to obstruct the administration of justice," and in comment on the statute now before this court said: "The act does not define how near the court the misbehavior must be, nor the character of such misbehavior." This was exactly the position taken by the District Court in this case, and it was a doctrine essential to Judge Brown's condemnation of the juror, May. As a nonessential part of his decision—in fact, the merest *dictum*—bearing no relation to the issue before him, Judge Brown said that the act of 1831 was passed to prevent "the courts from interfering with newspaper comments on trials." It is suggested that this *dictum* is inconsistent with Justice Brown's finding that "the act does not define * * * the character of such misbehavior."

In Schulenburg's case the petitioner asked the court to protect him from service of garnishment from the State court while he, a nonresident, was in attendance as a witness in the Federal court. The court decided that because of the provisions of section 720, Rev. Stat., an order operating directly or indirectly to stay proceedings in the State court could not be issued, and that petitioner had a complete remedy in the State court. There was no

showing that the operation of the State writ was
obstruct the administration of justice in the Fede
court wherein Schulenburg was a witness. The co
held that in so far as the act may have been conten
of the Federal court it was purely constructive, a
that it was not within the provisions of the act un
consideration here, because it did not tend to obstr
the administration of justice. That portion of t
opinion to the effect that the phrase important
this case refers "to riotous or unseemly conduct
the court room or in such immediate proxim
thereto as to interrupt the sessions of the court
the orderly conduct of business therein" is not o
dictum, but is directly inconsistent with the views
the same court concerning the section when May w
condemned thereunder. If this was Justice Brow
abiding view of the law of contempt and the act
1831, it is an occasion for surprise that he did n
insist that McCaully should have a hearing in t
Supreme Court.

Three of the cases used by the District judge
support his opinion, quoted above, are decisions
this court, being all of the decisions to date deali
with the precise question of construction in the c
at bar. In our opinion, they carry more significan
than have been accorded to them, for they progr
sively depart from that narrow construction of
statute held by Justice Baldwin in Poulson's ca
and in the *dicta* of Justices Field and Brown, a c
struction which is essential to the relief of plaintiffs
error.

Savin's Case, 131 U. S. 267.—Savin, in the corridor of the courthouse, beyond the personal cognizance of the judge on the bench, and without at all interrupting "the orderly conduct of business" in the court, attempted to corrupt a witness in the case then on trial. This court was specifically asked (p. 271) to follow the *dictum* of Justice Field, in *Ex parte Robinson*, 19 Wall. 505, 511, and to hold that summary power existed in the court only when there was "misbehavior causing a disturbance of which the judge holding the court was conscious, and could perceive through his senses, in the immediate presence of the court, or so near thereto as to prevent the court from duly proceeding in the administration of justice." It is very noticeable that Savin's conduct was not physically cognizable by the judge of the court, and that it did not tend to a physical interruption of the court's business. In holding Savin under section 725, Rev. Stat. (act of 1831), the court in effect refused to follow Justice Field's views as to the force of the expression of the statute in question, although citing *Ex parte* Robinson for a generalization only of the act of 1831.

In the opinion of the District Court it is pointed out (R. 141) that although the Robinson case has been cited, and at times quoted from by this court, yet Justice Field's limitation of the act to misconduct of which the judge had personal cognizance and which physically disturbed the court, never has been

approved, and that even Justice Field disregarded it in the *Sharon-Hill Case*, 24 Fed. 726.

Cuddy's Case, 131 U. S. 280.—This case arose at the same term of the same court at which Savin's offense was committed, but the facts are very different. Unlike the situation in Savin's case, the court was not trying the case, with reference to which the alleged offense was committed, at the time thereof. On the day before the trial of *United States* v. *Young*, McGarvin, a trial term juror, was corruptly approached by Cuddy touching the probability that he might become one of the Young panel. Notwithstanding this important difference in facts, the court held that the principle of the Savin decision required a denial of Cuddy's appeal. On the hearing it was also sought to be shown that Cuddy's interview with the prospective juror was held away from the precincts of the court. This was regarded to be beyond the court's consideration, as the application for a writ of habeas corpus was in the nature of a collateral attack, and the fact was not shown of record.

McCaully's Case, 25 Appeals D. C. 404; 198 U. S. 582, 586.—The history of this case is most significant. Its facts are stated with marked inaccuracy by counsel for plaintiffs in error in their brief (p. 32). It did not involve "the corrupt solicitation of a juror in a pending case by an attorney" and while the jury "had been permitted to disperse." The real facts are significantly illustrative. In them is found a situation which is so utterly lacking in any feature

which supports mere contiguity to the court as an essential element in misbehavior "so near the court as to obstruct, etc.," that the action of this court in refusing to review the case, with the absence of any physical nearness to the court as the only basis for appeal for review, must be taken as a clear and final repudiation of the interpretation of this part of the statute given by Justice Field. Here are the real facts of McCaully's case: S. was a juror on the November venire of the Supreme Court of the District; G. had been indicted, and his case had been assigned for trial on November 28. Two days before (November 26) S., of course, being yet but a prospective or possible juror, was inveigled into McCaully's store, one-half mile from the Court House, and there, by McCaully (who was not an attorney), sought to be interested in G.'s behalf. Here was neither nearness of time nor place, nor was there a pending case under consideration by the prospective juror S., nor was the court in fact sitting, yet McCaully was given a sentence of six months in jail for "misbehavior so near thereto (the presence of the court) as to obstruct the administration of justice." The question which was attempted to be presented here was whether the following interpretation of the law by Justice Morris was correct, viz:

> The question is not one of geography or topography, or propinquity or remoteness, but one of direct influence upon the administration of justice. * * * Bribery of a juror or the intimidation of a witness pollutes the foun-

tains of justice at their source, and reach at once to the very seat and shrine of the administration of justice, whatever be the place where the formal act is done. Under such circumstances the court is wherever the juror or the witness is; and there is no question of locality in the case.

When this court refused to entertain McCaully's petitions for writs of habeas corpus or certiorari (198 U. S. 582, 586) we must assume it was because the opinion of the Court of Appeals of the District of Columbia in his case was approved.

(a) CASES IN WHICH THE PHRASE HAS BEEN APPLIED.

The lower courts have applied the particular clause of the statute under consideration to a great variety of circumstances. Thus these acts were found to be "near" the court, although distant from the sitting court in location or time of performance, or both:

The visit at a private house by a juror sitting in a criminal case on trial, at recess, to a person jointly indicted with defendant on trial, but not himself being tried, and there discussing the case. *In re* May, 1 Fed. 737.

Using violent and abusive language upon the street to an examiner of a Federal court with reference to an examination then pending and being taken with reference to a cause then proceeding in the court. *United States* v. *Anonymous*, 21 Fed. 761.

Threatening a witness before a Federal court commissioner. *Sharon* v. *Hill*, 24 Fed. 726.

Persuading one known to be an important witness in a criminal case about to be tried to avoid service of subpoena. *In re Brule*, 71 Fed. 943.

Assaulting a court commissioner on the highway after and because the commissioner had held respondent to the Federal grand jury. *Ex parte McLeod*, 120 Fed. 130.

Asking a citizen to approach a juror in an attemp to influence his conduct in a pending case and, also, attempting, on the street, to improperly influence a witness in the same case. *United States* v. *Carroll*, 147 Fed. 947.

Causing process to be issued in a civil suit for malicious prosecution, instituted by respondent, upon witnesses who had not yet had opportunity to return to their homes beyond the jurisdiction of the court issuing the process, and who were witnesses for the Government in a criminal prosecution, just terminated by the acquittal of respondent. *United States* v. *Zavelo*, 177 Fed. 536.

Attempting to corrupt a member of a jury venire with respect to a case set for trial during the term, the time of the approach being eight days before the date assigned for the trial of the case, and the place about 2,700 feet from the Court House. *Kirk* v. *United States* (C. C. A.), 192 Fed. 273.

Swearing falsely to statements in affidavits before a notary public to be afterwards filed in Federal court in a patent case. *In re Steiner*, 195 Fed. 299, 303.

Writing and sending to the residence of a Federal judge letters respecting a pending cause containing implied threats, and calculated to influence the judge with reference to the case. *United States* v. *Huff*, 206 Fed. 700.

Committing an assault upon a trustee in bankruptcy. *O'Neal* v. *United States*, 190 U. S. 36.

We respectfully submit that these decisions leave the courts of the United States free to examine the conduct of an alleged contemnor, and to punish him summarily, if his act, wherever and however committed and whatever it is, has a purpose or tendency to directly interfere with and obstruct the consideration of a pending case.

The question then involved in the second (*B*) proposition of plaintiffs in error is whether press comments on a pending case, having a plain tendency to affect the consideration of the case, may be also brought within the statute as misbehavior "near" the court.

This question is answered by the State courts in the affirmative. Such was the position of the Supreme Court of Ohio in *Myers* v. *State*, *supra*, and of the Supreme Court of Tennessee in *Tate* v. *State*, *supra*, applying State statutes of similar terms. It is the view of other State courts as pointed out in the opinion of the District Court (R. 150), where *People* v. *Wilson*, 64 Ill. 195, 211; *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294, and *State* v. *Howell*, 80 Conn. 668, are considered. All of which are newspaper cases.

In Wilson's case, the Illinois court said that:

> All acts calculated to impede, embarrass, or obstruct the court in the administration of justice * * * would be considered as done in the presence of the court.

This was said of a newspaper publication respecting a pending case. The subsequent decision of *Storey* v. *People*, 79 Ill. 45, was had under a modified statute and was applied to a publication concerning a *concluded case*.

In the Massachusetts case, the newspaper was held guilty, the court being of the opinion that:

> If the publication amounts to a contempt of court because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court.

It is to be particularly noticed that the court uses this language as a reason why it was justifiable for the lower court to have initiated proceedings without a formal complaint.

In Howell's case, the Connecticut court held that it is not necessary to prove that jurors read the offensive publications because:

> A sentiment favorable or unfavorable to one of the parties to the case may be made to so pervade the community as to reach the court room and the triers and interfere with the fair and impartial performance by the latter of their duties.

Counsel for plaintiffs in error assume (pp. 47–52) that they can not be held because it is not alleged or

proved "that the publications complained of were ever circulated in the courthouse or that they were read by Judge Killits." We are content to leave this controversy to be determined on the argument of the opposing brief as answered by that found in the opinion of the District Court (R. 172), well supported as is that opinion by the decisions in *Telegram Newspaper Company* v. *Commonwealth, supra*, and *State* v. *Howell, supra*. The vital issue is the publication. The essence of the offense is conduct reasonably calculated to produce an atmosphere of prejudice where the pending case is being tried. *State* v. *Hazeltine*, 82 Wash. 81.

It is submitted that it is not essential to constitute publication of a newspaper article, tending to obstruct the administration of justice in a particular case, a contempt, to show that the article actually reached the eyes of the court or the jury, since witnesses may be intimidated or the trial may be influenced by the general atmosphere created by the article.

(b) ATTEMPTED TO AFFECT PARTIES.

We have seen that Federal courts have repeatedly found offensive conduct to be "near" the court when it is calculated to affect some one connected with the case, wherever he may be, with reference to the actual presence of the court, and whatever the relation in time to the court's actual sessions. Attempts to affect or affront the judge, a court commissioner, a court examiner, a prospective or possible juror, a juror at recess, a witness, a prospective or possible

witness, are found to be, respectively, misbehaviors "near" to the court, no matter where or when performed. Is there any possible reason why an attempt to poison toward the court the mind of a party so that the court's possible decrees against the party would be ineffective in moral force should not be added to this list? In this case the charge made and proven concerns misbehavior regarding a pending case both toward the judge having the case under consideration and toward a party thereto.

The information in the first count charges as follows (R. 71):

> That by reason of the aforesaid acts of defendants in issuing the aforesaid publications, the aforesaid publications, each and singular and in the aggregate, constituted misbehavior on the part of said defendants, so near the presence of this court as to obstruct the administration of justice, with reference to the suit hereinbefore referred to, and then pending before this court, in that said publications, each and singular, and in their aggregate effect, tended and were intended to embarrass said court, and to obstruct the administration of justice by said court in a performance of its duty with reference to the issues involved in said motions, through an impression to be conveyed to said judge thereof having the duties of said court to perform that any order it might make favorable to either said partnership, or to the said street car company, would meet with great public disfavor, and in that they tended to hinder said judge of said

court in the exercise of a clear and impartial judgment in said cause, and in that the publications, impugning the motives of said judge of said court, tended to interfere with the administration of the law by said judge of said court; and further in that they tended and were intended to provoke among the citizens of the city of Toledo, with reference to said pending cause, an open resistance to any order which said court might make therein not approved by said defendants; and further tended and was intended to bring to the mind of said judge of this court performing the duties of said court, with reference to said suit, an impression and feeling that any order in said cause issued upon said motions, not approved by said defendants, might be met by the open resistance of a large number of the people of the city of Toledo.

The issue concerning which the publications were made was hotly disputed between the managers of the street railway company on one side and the citizens of Toledo represented by the municipal corporation on the other. The court need but look at the publications of March 24, 25, and 26, 1914, to find direct encouragement to the populace, parties in fact to the case, to resist an adverse decision. If it may be thought that these publications, made each in 50,000 papers circulated in the city, are nevertheless not shown by the record to have been brought to the attention of the judge of the court, and therefore had no tendency to embarrass him in the performance of his official functions, plaintiffs in error

are still confronted with the fact that they are charged with attempting, and are proved to have attempted, the corruption of parties to the litigation in a manner amounting to the obstruction of the administration of justice.

This summing up of these publications in the opinion of the District Court (R. 178) is amply justified by the facts:

> If there were no other publications for the court to consider than those of the midweek of March, an offense sufficiently serious to warrant a large fine would be present. March 24: The traction company is trying to "evade" its obligations by taking its case into the Federal court, but the city solicitor will "protect" any individual who takes the law in his own hands nevertheless. March 25: The judge of the court is an uncertain quantity, liable to be unduly impressed by the "high-priced legal talent" sold to the "Big Con," and therefore to furnish the latter with a "strangle hold" on the people; but it is planned that the people shall board the cars in large numbers on Friday night after listening to 15 speakers in Memorial Hall, and by aid of "sinew" furnished by union labor compel the conductors to accept 3-cent fares, "restraining order or no restraining order by the Federal court." March 26: While the judge of this court is holding "in the balance the case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators," preparations are going forward for the mass meeting in Memorial Hall to be assisted by union

labor, and the police will not "use their clubs on car riders who refuse to pay more than 3-cent car fare" that night, because the law is "only what the people will back up." This is preaching, advocating, anarchy. No sophistry of argument, no ingenious theory that the people of this city were interested in the case in the manner of "stockholders of a large corporation" entitled to receive reports of their business, suffice to gloss over the seriousness of this sort of thing, and it would be no less anarchistic if jurisdiction in this court to hear the traction case were palpably, unequivocally absent. These are not merely the result of reportorial inefficiency and enthusiasm, for the editor in chief, himself, gave them some personal attention.

Plaintiffs in error can not object that the citizens of Toledo are thus considered and treated as the real parties in interest against the traction company, because in their issue of March 26 they editorially said that the issue in the Federal court was "the case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators." The aggravation of this case lies very largely in the attempts of The Toledo News-Bee and its editor to excite to a resistant hostility to the court thousands of people who had so direct and vital an interest in the case as to be the real parties in interest, as they were in fact by representation. The charge of an attempt to inflame the parties is plain, and that the charge is supported by testimony there is not the slightest doubt.

Plaintiffs in error (60–64) discuss the case pending before the District Court with reference to which the offensive publications were made, but the purpose of the discussion can only be surmised; no application is directly attempted. If the purpose is to argue that the court had no jurisdiction to try the issue invoked by Doherty & Company against the city of Toledo, and therefore The Toledo News-Bee was free to indulge in any sort of contumelious utterances toward the court, and parties, with reference to the case which suited its extravagant fancy, we are content in citing such authorities as *Cooper* v. *People*, 13 Colo. 337, and *United States* v. *Shipp*, 203 U. S. 563, under which it seems idle to argue that it is safe to attack a court even under circumstances of disputed jurisdiction, which counsel for plaintiffs in error assume existed here.

IV.

THE LIBERTY OF THE PRESS DOES NOT PERMIT TRIAL BY NEWSPAPER.

The liberty of the press does not permit publications respecting pending causes which are reasonably calculated to interfere with the due administration of justice. *State* v. *Morrill*, 16 Ark. 384; *Peo.* v. *News-Times Pub. Co.*, 35 Colo. 253 (205 U. S. 454); *McDougall* v. *Sheridan*, 23 Ida. 191; *State* v. *Shepherd*, 177 Mo. 205; *State* v. *Rosewater*, 60 Nebr. 438; *Burdett* v. *Commonwealth*, 103 Va. 838; *State* v. *Hazeltine*, 82 Wash. 81.

The court's attention is invited to the opinions in *United States* v. *Huff*, 206 Fed. 700, and *United States* v. *Anonymous*, 21 Fed. 761, respecting the scope and effect of the act of 1831, which ably discuss the causes initiating the enactment of the statute and completely dissipate the notion that Congress intended to clothe newspapers with an immunity in attacking courts under all circumstances. There is no reason why Federal courts should not apply this statute as State courts apply local statutes of similar import. See *Myers* v. *State*, *supra*, *State* v. *Galloway*, 45 Tenn. 326, and *Tate* v. *State* (1915), 132 Tenn. 131.

Plaintiffs in error (pp. 41–45, 48–49) place much weight upon the decision in the case of *In re Daniels-Cuyler* v. *Atlantic & N. C. R. Co.*, 131 Fed. 95, holding that it was not a contempt within the meaning of the statute to publish an editorial criticism of the court's appointment of a receiver. There need be no dispute on this point, for it is conceded that the act of 1831 limited the powers of Federal courts to punish every character of contempt; and there is a broad distinction between a criticism or libel of the court because of the exercise of a judicial function, after the performance of its official act, and an harrassment of the judicial functionary or castigation of the parties to the litigation, during the pendency of a cause before the court. The line of demarcation is more clearly emphasized when it is remembered that the act of 1831 was to prevent a repetition of contempts such as Judge Peck's case discloses, when criticisms are published upon matters *res adjudicata*.

CONCLUSION.

The following propositions are submitted as indicative of a correct construction of the statute under consideration:

1. The language is not ambiguous; there is no suggestion that any particular class of persons is omitted from its operation; to give it such construction is judicial legislation.

2. Congress had the prior law well in mind when the act was considered (R. 138), and therefore acted advisedly. The intention to change existing law by legislation must be reasonably plain from the language of the act; at least a violent and subversive change will not be inferred, unless plainly necessary.

3. Justice Baldwin's construction is inconsistent with the purpose of the act as declared in the title, because it finds the act changing prior law rather than declaring it.

4. To hold that the press has been rendered immune under all circumstances is to hold that the act derogates from the common law. The intention to depart from the common law must be reasonably plain before that view will be adopted.

5. While there is no ambiguity of language which justifies resort to the legislative history for interpretation, yet, if that were necessary, it would show no intention to free the press under all circumstances; rather the contrary must be inferred, first from the fact that all of Judge Peck's supporters in the Senate voted for it (R. 137), and, second, that, with the

Pennsylvania statute before it, the first section of the State act was adopted with material modifications, and the second section entirely rejected.

It is submitted that the petition for a writ of certiorari should be denied and the judgment of the Circuit Court of Appeals affirmed.

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FEBRUARY, 1918.

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